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IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. 685

THE SUPERIOR OIL COMPANY,
Cross-Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Superior Oil Company conditionally cross-petitions for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on July 14, 1970 in the event any such petitions filed by other parties below are granted by this Court.

OPINIONS BELOW

The Opinion of the Court of Appeals and its Opinion on Rehearing are not yet reported. The Opinions and Orders of the Federal Power Commission are reported at 40 FPC 530 and 41 FPC 301. The Opinion of the Hearing Examiner [111 J. A. (1) 62d — 447d] is reported at 40 FPC 703. The referenced Opinions of the Court of Appeals and those of the Federal Power Commission are separately presented, as Appendices A, B, D & E, respectively, of Petition for Writ of Certiorari of Continental Oil Company, et. al., which said Appendices are hereby adopted for the purpose of this Conditional Cross-Petition for Writ of Certiorari.

JURISDICTION

The Opinion of the Court of Appeals was entered on March 19, 1970 (Appendix A, pp. 1-70) and was clarified by an opinion and order denying petitions for rehearing entered on June 16, 1970 (Appendix B, pp. 1, et seq.). Judgment as mandate was issued July 14, 1970 (Appendix C, p. 1).

We invoke the jurisdiction of this Court under 28 U.S.C. 1254 (1) and Section 19(b) of the *Natural Gas Act*, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

In light of the Opinions and Judgment below, Superior opposes the granting of petitions for writs of certiorari in this case on grounds that such petitions are premature and questions raised thereby are not yet ripe for review by this Court. However, if this Court concludes otherwise and grants petitions filed by any other parties, the following questions necessarily are also presented:

1. WHETHER THE COURT OF APPEALS ERRED IN REFUSING TO ENTER AN ORDER REMANDING THIS CASE TO THE FEDERAL POWER COMMISSION WHEN THE COMMISSION ITSELF HAD FORMALLY REQUESTED SUCH A REMAND.

2. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING AN ORDER OF THE FEDERAL POWER COMMISSION WHICH REDUCED PRODUCER RATES AND PROVIDED FOR REFUNDS WITHOUT FINDINGS ON THE SUPPLY OF GAS EXPECTED TO RESULT FROM SUCH RATES OR THE DEMAND FOR SUCH GAS, THUS FAILING TO ASSESS THE END RESULT OF ITS ORDER AS REQUIRED BY THIS COURT IN ITS *HOPE*[1] AND *PERMIAN*[2] DECISIONS.

3. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING AN ORDER OF THE FEDERAL POWER COMMISSION WHICH ESTABLISHED AREA CEILING RATES PRIMARILY ON THE BASIS OF UNIT COSTS BASED ON IMPRECISE ALLOCATIONS OF COMPOSITED AVERAGE COSTS AND ESTIMATED FUTURE UNIT COSTS OBTAINED FROM STALE DATA, A LARGE PART OF WHICH WAS NEITHER TYPICAL NOR REPRESENTATIVE OF THE COSTS INCURRED AND TO BE INCURRED IN THE AREA INVOLVED, ALL CONTRARY TO THIS COURT'S HOLDING IN *BALTIMORE & OHIO R. CO. v. ABERDEEN & ROCKFISH R. CO.*, 393 U.S. 87.

4. WHETHER THE COURT OF APPEALS ERRED IN HOLDING UNIT COSTS AND AREA CEILINGS FIXED THEREFROM AS FOUND BY THE COMMISSION TO BE SUBSTANTIALLY SUPPORTED WHEN CERTAIN ELEMENTS OF SUCH COSTS WERE SUPPORTED BY A SIX-

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[1] *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603.
[2] *Permian Basin Area Rate Cases*, 390 U.S. 747.

GLE EXPERT WITNESS BASED UPON A FACTUAL ASSUMPTION OF THE WITNESS OTHERWISE SHOWN TO BE FALSE AND ERRONEOUS.

5. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING COMMISSION ORDERS BASED UPON ACCEPTANCE OF DOWNWARD PROJECTIONS OF COST DATA FOR A PRIOR YEAR SHOWN TO BE EXCESSIVE AT THE TIME OF THE COMMISSION DECISION CONTRARY TO THE PRINCIPLE OF THIS COURT'S DECISION IN *UNITED STATES* v *UNITED STATES GYPSUM COMPANY*, 333 U. S. 364 at 395.

6. WHETHER THIS COURT SHOULD RECONSIDER ITS *PERMIAN* DECISION AFFIRMING COMMISSION METHODOLOGY FOR ESTABLISHING AREA RATE CEILINGS AND REFUNDS OF COLLECTIONS IN EXCESS THEREOF WHEN EXPERIENCE HAS SHOWN THAT SUCH METHODOLOGY HAS RESULTED IN RATES WHICH WILL NOT PRODUCE SATISFACTORY LEVELS OF EXPLORATION, DEVELOPMENT AND PRODUCTION RELATIVE TO THE REQUIREMENTS OF THE GAS CONSUMING PUBLIC.

STATUTES INVOLVED

Sections 4, 5(a), 7(e), 16 and 19(b) of the *Natural Gas Act*, 52 Stat. 821, as amended, 15 U.S.C. 717-717w, (frequently referred to herein as the *Act*) are involved and are reproduced in Appendix F, pp. 1-8 of the Petition for Writ of Certiorari of Continental Oil Company, et al., adopted herein by this reference to avoid duplication.

STATEMENT

This is an area rate case under Sections 4 and 5 of the *Natural Gas Act*, supra. The Commission decision and orders to be effective October 1, 1968 were based primarily

upon 1960 data and prescribed ceiling rates for sales of natural gas produced onshore and offshore Southern Louisiana, the source of approximately one-third (1/3rd) of the nation's entire interstate natural gas supply. The effect of the ceilings fixed was a reduction of area producers' revenues by $49 Million per year (Appendix D, p. 176). and the order provided for the ordering of refunds estimated to amount to $190 Million as of September 30, 1968.

At the time of the Commission decision there was mounting evidence of an increasing shortage of natural gas throughout the United States. Today the fact of shortage is recognized among all segments of the natural gas industry[3] and has brought about the taking of emergency action[4]. The Court of Appeals concluded that the supply of gas is dangerously low and the effect of the prescribed rates upon the industry's capital requirements in the light of required exploratory effort had not been properly considered by the Commission. Pointing to a number of deficiencies in the Commission decision in the light of this Court's *Permian* decision, supra, and with express "misgivings" the Court of Appeals nevertheless affirmed, holding that the Commission could stay, rescind and set aside its opinions and orders to remedy such deficiencies, and assumed that the Commission would do so if warranted by current data. On rehearing with questions raised as to such an "affirmance" the Commission filed a formal request for remand,[5] notwithstanding which, the Court of Appeals

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[3] A study by the Commission Staff released in late 1969 eliminated any question on this subject.

[4] Importation of LNG at prices equivalent to approximately 75¢ per Mcf during summer months and $1.44 during winter months, wholesale was authorized as recently as August 28, 1970.

[5] As the result of specific questions from the Court, Chairman Nassikas and Commissioner O'Connor dissenting.

again "affirmed", but held, as a part of the remedy, that the Commission should re-assess its opinions and orders and make any changes found necessary affecting revenues from gas delivered or to be delivered, and any other matters.

This Cross-Petition by Superior is conditional because unless this Court entertains other petitions questioning the decision by the Court of Appeals, further inquiry by the Commision into its prior opinions and orders, and modifications and recision thereof as may be found necessary as contemplated by the Opinion of the Court of Appeals, will render all questions which may now be presented premature and not ripe for review. However, if this Court should grant petitions filed by other parties, Superior submits that the questions presented by this Cross-Petition necessarily also are timely and their consideration is urged.

Procedural History

The case was instituted on May 10, 1961. Cross-Petitioner was a Respondent before the Commission along with all other gas producers in the area, as well as pipelines, distributors, and interested state commissions. The Commission's original decision Opinion No. 546 (Appendix D, pp. 1-258) was issued September 25, 1968. Timely applications for rehearing and motions for stay were filed under Section 19(a) of the *Act*. In separate motions for reopening of the record, Superior and others sought admission of more current evidence reflecting the national gas supply situation, rising costs, and other data relevant to rate fixing [See IV J.A.(I) 943d and 957d]. The Commission on March 20, 1969 issued its rehearing Opinion No. 546-A (Appendix E, pp. 1-112) denying the applications, motions for stay, motions for limited reopening, and modifying its original opinion in part only.

Timely petitions for review were filed pursuant to Section 19(b) of the *Act*, supra, in the Court below, to which the Commission duly certified the record. Motions for leave to adduce additional gas supply evidence were made to the Court, without success. The Court's affirming Opinions and Judgment have been mentioned above.

The rate reducing orders of the Commission decision have never become effective as the result of Commission and Court successive stays, the present stay being ordered by the Commission after the Court's decision. Motions by Superior and others to reopen and reconsider its prior orders have not been acted on by the Commission.

The Commission's Opinions

With excessive reliance on *Permian* results, the Commission prescribed area ceiling rates based on unit costs. The Commission costing was derived from the compositing of investment, costs, and expenses, to reach averages. Issues raised here involve the determination of unit costs to fix rates. Particular reference is made to errors in lease acquisition and drilling costs as computed in new gas costs. As to flowing gas costs, the issue raised relates to use of non-representative and atypical averages for fixing area costs.

In a dissenting opinion on rehearing, (Appendix E, pp. 104 and 106), Commisioner John A. Carver, Jr. pointed out that the record supports fixing just and reasonable rates at higher levels referring particularly to the nature of the Commission's choice in fixing successful drilling costs; i.e.:

> "With apparent mathematical certainty, 1958 Census drilling costs were downtrended 5.8%. The Commission's 'own conclusions' obviously do not provide the 5.8% factor. The figure selected traces to the 'success-

ful well allowance, as to which there were four separate witnesses, as follows:

Witness	Sponsor	Estimate
Robert H. Park	Producers	3.94¢
Stephen E. Sherwin	Producers	3.30¢
Harold L. Spain	FPC Staff	3.28¢
Herman G. Roseman	Distributors	2.88¢

Witness Roseman's estimate of 2.88¢ was based on the 2% downtrending factor; reversing it would substitute a figure of 3.0¢ per Mcf for this item of cost, a net difference of 0.12¢ per Mcf. The producers also contended for revised footage figures which would have increased the figure to 3.40¢ per Mcf, or a total increase of 0.52¢ — still well below the estimate made by the Commission's own witness, Dr. Spain.

"The calculation of the cost per successful gas foot in Opinion No. 546 was $16.89 (page 37). The record shows that the Joint Association Survey cost figure was $18.57. This would calculate to an additional allowance of 0.29¢ per Mcf."

And with reference to Dry Hole Costs:

"Similar to successful well costs, the 'dry hole' calculation was derived from testimony as to which there was variation among the witnesses as follows:

Witness	Sponsor	Estimate
Robert H. Park	Producers	1.58¢
Stephen E. Sherwin	Producers	2.30¢
Harold L. Spain	FPC Staff	2.08¢
Herman G. Roseman	Distributors	1.42¢

"The Commission followed Roseman, the lowest estimator, who used as underlying support an estimate of $9.51 per foot of dry-hole drilling costs, after making his own judgmental adjustment to Census data which showed $8.92. The 1960 Joint Association Survey figure was $10.56 per foot, and if that record figure were substituted, the allowance would be 1.61¢ per Mcf, still well below Staff witness Spain's estimate,

and indeed lower than any witness except Mr. Rose-man, whose estimate was accepted. The difference is 0.19¢."

Commissioner Carver emphasized the issue of whether the prices fixed would elicit present and future gas supply inasmuch as "* * * a serious problem of gas supply has been identified, requiring action *in this case*." (Appendix E, p. 74). He viewed "incentive" as negated by the roll back in rates, particularly because revenues from gas previously found and sold are the major source of capital funds for new investment, and regarded refunds and rate reductions as retroactive expropriation of the "incentive" which had theretofore induced commitment to interstate commerce.

The Court of Appeals Opinions

Despite affirmance, the thrust of the Opinions of the Court of Appeals is that the Commission failed to follow this Court's admonitions in *Permian*, supra, on the supply problem and related issues. Stating that its affirmance does not reflect full satisfaction with the performance that the Commission turned in "* * *" (Appendix A, pp. 2-3), the Court concluded that the Commission was permitted "to stay, modify or rescind any part of its order, notwithstanding our affirmance, if circumstances appearing since the issuance of the orders make a change advisable." (Appendix B, p. 2). Between these statements the Court found more than ample grounds to reverse the Commission on each of the questions now presented.

On questions involving the Commission's findings on cost, the Court of Appeals was "troubled" but found *Permian* controlling. At the same time, the Court stated its agreement with Commissioner Carver's dissenting view "that the Commission should not have relied upon cost

calculations floating in a vacuum but should have reviewed its computations in light of supply, demand, and other market forces * * *" (Appendix A, pp. 45-46).

The Court found no merit in the argument that area costs founded on national data only was not substantially supported because the national data contained seriously distorting elements as applied to Southern Louisiana, and held that *Baltimore & Ohio R. Co.* v. *Aberdeen & Rockfish R. Co.*, 393 U.S. 87, was not controlling here because the Examiner found national data to be the best available index to the area costs. (Appendix A, pp. 42-43)

The Court of Appeals found "* * * the Commission failed to approach supply and demand in either a semi-quantitative or qualitative way" (Appendix A, pp. 49-50), and listed defect after defect in "findings" on related questions of supply, demand, and actual availability of capital to the industry at rates prescribed (Appendix A, pp. 46-60). The Court referred to more current data available to the Commission, including the study by the Commission's Staff released in October 1969, which indicates "perhaps a certainty, that the supply of gas is dangerously low" and "a serious shortage, in fact, may already be unavoidable". (Appendix A, p. 62). It found that "as to the crucial issue of sources for adequate financing, the Commission's findings, and for that matter the evidence, are almost non-existent." (Appendix A, p. 63). In sum, the Court found that the crucial assessment of facts, as to supply and demand, and the impact of prescribed rates on that supply and demand called for by *Permian* had not been made in this case. The Court below held that "affirmance" is not a "judgment that the supply problem is not serious enough to require immediate modification of the order herein sustained" (Appendix A, p. 59).

Petition for rehearing by this Cross-Petitioner urged that reversal and remand were required in light of the deficiencies found. We also raised the question of whether an "affirmance" would leave the Commission with the power to vacate, modify, or rescind its prior orders, as contemplated by the Court. Before acting on rehearing the Court directed the Commission to respond to two specific questions concerning its power in such circumstances.[6] In response, the Commission (1) took the position that it would not "have authority to permit any *retroactive* increases or decreases in a rate order, unless authorized to do so by a court", and (2) the Court had "full statutory power to authorize or instruct the Commission" to "reconsider" the record or "reopen the record" for specific purposes "without necessarily reversing the Commission and vacating the order for a new hearing". It requested clarification of the Court's intent to authorize "retrospective adjustments" in light of its "use of the words 'sustained in full'"; and then requested a "remand" of the case so "that the Commission could discharge its regulatory responsibilities consistent with the Court's opinion."[7]

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[6] The full text of the questions posed by the Court is:

"(1) Whether the Federal Power Commission has authority to stay, modify or rescind an order once that order has been affirmed by this Court, if circumstances appearing since the entry of the order seem to make these actions advisable.

"(2) Whether this Court may, in the exercise of its equitable powers, affirm an order of the Commission while preserving the authority of the Federal Power Commission to stay, modify or rescind the order if the circumstances seem to make these actions advisable."

[7] "Response of Federal Power Commission to Petitions for Rehearing and Request for Remand", pp. 2-5 (Chairman Nassikas and Commission O'Connor did not concur in the request for remand)."

On June 16, 1970, the Court denied the Petitions for Rehearing and the Commission's request for remand stating that "affirmance of the Commission's orders is structured so as to allow the Commission great flexibility" (Appendix B, p. 1). The Court 'pointed' to its remedial powers under Section 19(b) of the Act and held, ". . . pursuant to our equitable powers we make it part of the remedy in this case that the authority of the Commission to reopen any part of its orders, including those affecting revenues from gas already delivered, is left intact. The Commission can make retrospective as well as prospective adjustments in this case if it finds that it is in the public interest to do so". It was emphasized that on reopening, all issues including modification of rates, and the disposition of refunds if any, to be ordered were to be considered. (Appendix B, pp. 2-3).

REASONS FOR GRANTING THE WRIT

1. Importance of this case to all segments of the natural gas industry and all classes of consumers cannot be overstated. The shortage of natural gas recognized by the Court of Appeals is directly involved here because the rates prescribed apply to the pricing area that now provides up to one third of the total national gas supply, and serves more than one-half of the consuming population of the United States. These rates were fixed primarily on the basis of 1960 cost data considered in a vacuum. There was little or no regard for the impending supply shortage, rising operating costs, increased taxation under the Tax Reform Act of 1969,[8] the erosive effects of inflation, and the compelling urgency for increased national and area

[8] Peculiarly severe for the gas and oil industry, depletion was reduced percentage wise to 22% from 27½% and a minimum tax of 10% of certain percentage depletion utilized to reduce taxable income was enacted.

exploratory attempts to find supply to meet increased demand.

Under the Commission orders amounts now exceeding $375 Million, including interest, would be "refunded" to pipeline companies.

Said refund amounts have accrued in largest part since 1960. Such amounts, revenue when received even though subject to refund, with other internally generated revenue have been used for past operations including exploration and development. Notwithstanding such use, the level of new findings of gas supply during the decade 1960-1970 has been completely inadequate to meet the increase in demand. The past inadequacy of exploration will necessarily be accentuated in the future if the refunds and rate reductions ordered are carried out. Cash on hand is necessary for exploration.

Continued and increasing insufficiency of gas findings will work to the disadvantage of the industry and even more to the disadvantage of the public. Inevitably more must be paid for gas. The consuming public has only the alternative of paying more for a diminishing amount of gas or of paying more for a constant and hopefully increasing supply.

Producers' annual revenues under the present order will be rolled back to levels of the 1950's and from such reduced revenue the ordered refunds must be paid. There will be little if any industry money left for any exploration.

The vital question now is how best to remedy the situation as promptly and as equitably as possible. To that end, the Court of Appeals fashioned a remedy which will permit the Commission to take the corrective steps dictated by present circumstances and known facts, including modification and rescission of the orders reviewed below as

may be required. Said Court recognized that harm done cannot be undone.

Should this Court grant any petitions for certiorari directed to the power of the Circuit Court of Appeals to create the above remedy as fashioned by it, then it must be acknowledged that the "affirmance" below is based upon misinterpretation of the *Act* but for which the case would have been "reversed".

"If the corrective measures contemplated by the Court below are not undertaken, then reversal and remand is now justified because of the deficiencies in the Commission decision shown by the opinions of the Court below strengthened by the request by the Commission itself for a remand. Rarely is there concert of plea for further and corrective action by the Court, the agency, and most petitioners for review. Whenever such concert occurs, the plea should be granted."[9]

Certainly, if the Court below erred in holding that the Commission has the power to rescind its orders in light of the Court's affirming opinion, it must also have erred in permitting finality to opinions and orders which it found to conflict with *Permian* and other decisions of this Court.

The Court of Appeals stated, quite plainly, its disapproval of the Commission's "performance", and that the Court had "little inclination to join the Commission in presiding over" the possible "result" of a predicted "severe gas shortage" (Appendix A, p. 47 FN 87). The "performance" disapproved of, the failure to recognize the then approaching gas shortage or to appraise the effect of the ceilings

[9] *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 353 U.S. 944 (1957).

fixed on new gas supply are enough to require reversal and remand to the Commission for correction.[10]

Beyond this, a formal request for remand by the respondent agency which, if not a confession of error, certainly is a confession of possible error which the agency would like the opportunity to correct, clearly should have been granted. The same deference to agency expertise should extend to request for remand[11] that is paid other agency orders.

2. On the issue of adequate supply, this Court's mandate to the Commission in *Permian* was plain, requiring Commission "assessment of the consequences of its orders for the character and future development of the industry[12]. Here where adverse consequence to the industry is so apparent, failure to heed this Court's *Permian*[13] mandate is inexcusable. Remand with instruction would have been proper.

Further, the Court below found that the Commission's conclusion that the rate of return "should foster an active exploration program consistent with both the financial needs of the industry and the protection of the public in-

[10] *Federal Power Commission* v. *United Gas Pipe Line Co.*, 393 U.S. 71. See also *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 332 U.S. 194; *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17; and *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, supra, p. 14.

[11] Indicated in the Commission's response to the Court below to have been determined by Commission majority inasmuch as there were two noted dissents. See FN 5, supra.

[12] *Permian Basin Area Rate Cases*, 390 U.S. 747, 792.

[13] "* * * the Commission evidently believed that price should be employed functionally as a tool to encourage the production of appropriate supplies of natural gas. A price is thus just and reasonable within the meaning of §§ 4(a) and 5(a) not merely because it is 'somebody's idea of return on "rate base"' but because it results in satisfactory programs of exploration, development and production." 390 U.S. 747, 796.

terest, while specific, was useless to the reviewing court "because the Commission has simply stated a figure floating in a vacuum" and concluded without more that this figure will "foster an active exploration program". This Court's holding in *Permian*, supra, that the Commission must indicate fully and carefully the method by which and the purpose for which it has chosen to act[14] thus was disregarded and remand was required.

3. It escaped the Court below that the litigants were not drawing a comparison between gas wells and a railroad but had assigned as error that national cost data is not typical of Southern Louisiana costs. The typicality of evidence and reasoned findings therefrom which this Court required in *Baltimore & Ohio R. Co.*[15], *supra*, cannot be present where the Court below conceded that the composited national costs complained of consisted of "* * * inclusion of areas that are not of the same character as this region". (Appendix A, pp. 42-43). Such inclusion of atypical and non-representative areas necessarily distorted the composite result applied to Southern Louisiana.

The inadequacy of the imprecise allocations, composited averages and estimated future unit costs Petitioner complains of were best expressed by Commissioner Carver in his dissenting opinion. (Appendix E, p. 111).[16]

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[14] *Permian*, supra, at pp. 792.

[15] "The requirement for administrative decisions based on substantial evidence and reasoned findings — which alone make effective judicial review possible — would become lost in the haze of so-called expertise." 393 U.S. 87 at p. 92.

[16] "*Permian* stands for the idea that Southern Louisiana and other area rate cases subsequent to *Permian* should reflect a better quality of analysis. I think that Opinion No. 546 disappoints in this respect. The petitions for rehearing presented an oppor-

4. Petitioner is unable to tell to what extent the Court below gave any serious consideration to the cost calculations made by the Commission, which in large measure were adopted without change from the testimony of the witness Herman Roseman[17].

This witness testified that he was an "economist statistician" but had never had any first hand experience with the oil industry, nor with drilling practices of the industry, nor with respect to oil or gas well spacing. He determined industry lease acquisition costs to be 26.4% of industry drilling costs based upon a data series he selected, and then testified: "I related industry lease acquisition investments to industry well drilling costs because I had no basis for assuming that the ratio was any different in gas than it was in oil."

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tunity to correct errors; and although some have been corrected in the larger matter of costing ambiguities, Opinion No. 546-A is even more disappointing. My analysis of a selected group of the costing issues forces a conclusion that precision and certainty are simply not to be found.

"We may share and sympathize with the 'numbers' reaction expressed by the Court of Appeals, Tenth Circuit, in its consideration of *Permian* (375 F.2d 6, 24). But the 'assumptions, allocations, formulae, equations, averages, means and calculations' so plaintively described by that Court are the grist of Commission responsibility. They ought not be left to staff expertise, but rather should be given the scrutiny their impact on the final result suggests."

[17] The Court below contented itself with saying "We reject the contention that cost pricing is so imprecise as to make its use unlawful and hold that the Commission's findings here are based upon substantial evidence" and by footnote added: "We have inspected the Commission's findings as to each of the cost items attacked by the producers with some care. Although we do not discuss each individually, in order not to lengthen an already lengthy discussion we find each to be supported by substantial evidence" (Appendix A, p. 46 and FN 85).

What the witness failed to recognize was that this record showed with particularity that the density of development of an oil reservior ranges typically from one well to five acres to one well per 80 acres [(1) J. A. (1)p. 128] while similar development in a gas reservoir varies between one well to 160 acres and one well to 640 acres [(1) J.A. (1) p. 128]. Leases are acquired on the basis of bonuses paid almost invariably fixed on a per acre basis. Therefore, the assumption in the witness' testimony that there is no basis for assuming that the ratio was any different in lease acquisition investments in gas leases than it was for lease acquisition in oil leases is completely false.

A producer witness, using different assumptions, determined that gas lease acquisition costs were approximately 10% of industry drilling costs. Witness Roseman, rebutting this producer's testimony, stated that 10% was "far out of line with available industry data". Confronted with this rebuttal statement on cross examination, however, and in response to a question from the Examiner as follows: "Are you now saying that based upon your agreement today that your assumption as to Mr. Park's method was incorrect, that you do not today contend that Mr. Park's use of a 40% ratio is far out of line with the available industry data?" Answer: "That is right" [(1) J.A. (1) p. 263-264].

In the light of the above, the 26.4% figure used by the Commission as a percentage of drilling costs to determine lease acquisition costs is totally unsupported. It was founded upon the erroneous factual assumption that the ratios of cost of acquiring oil leases and of acquiring gas leases were not different, and, after rebuttal and further cross-examination, was repudiated by the witness.

Due to the mechanical mathematical interrelation of the various elements of cost to the total cost computed by the Commission for new gas, the insufficient lease acquisition

allowance of .39¢ per Mcf translates in total to a deficiency in computed new gas cost over all of 1.75¢ per Mcf. The Court below failed to apply this Court's mandate from *Permian* to examine the Commission methods of determining costs and "decide whether each of the orders' essential elements is supported by substantial evidence". This element is totally unsupported.

5. The Commission determined 1960 drilling costs of the industry for dry holes based upon a 1958 Census of Mineral Industries' average cost per foot. It downtrended the 1958 Census figures, based upon another data series, by 3.5% for the two-year period to 1960. At the time of the Commission decision the 1963 Census dry hole cost data were available and the Commission relied upon them to support its downtrending from 1958. This they show. However, the 1963 dry hole Census figure showed a decline of only 2.57% for the intervening five years or approximately one-half of 1% per year, which would possibly justify a 1% downtrending of 1958 costs as reflected by the Census of Mineral Industries to get a 1960 figure, rather than the 3½% employed by the Commission. However the Commission adjusted downward the 1958 Census figure to reach an estimate for 1960 at a rate 3½ times greater than it should have been. This item likewise is totally devoid of evidentiary support, and points to the basis of Commissioner Carver's dissenting opinion hereinbefore quoted wherein he complained of the "apparent mathematical certainty" and "judgmental adjustment" by the witness Roseman and justifies his conclusion that in determining costs in this case the Commission not only used averages but in every case selected the lowest available figure represented.

by the averages or allocations of the averages. Excessive downtrending to fix 1960 estimated cost from 1958 Census figures is also shown as to successful well costs.

The principle of *United States* v. *United States Gypsum Company*, supra, while never applied heretofore in connection with administrative agency findings should be applicable: "A finding is clearly erroneous when although there is evidence to support it the reviewing court on the entire evidence is left with the definite and firm conviction that mistake has been committed." See also *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, pp. 487-488, having direct reference to administrative findings, to the effect that "the substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes (the Administrative Procedure Act and the Taft-Hartley Act) that courts consider the whole record * * *."

6. This Court should here reconsider the *Permian* decision insofar as it approved Commission methodology (use of averaged costs) for determining rates.

Commission use of industry cost averages and allocations of such averages to obtain the lowest possible cost of gas, while heretofore accepted as within Commission discretion, has been shown by experimental experience to fail to balance investor and consumer interests or to result in rates which result in satisfactory levels of exploration, development and production.

The Commission accepted findings that "additions to reserves have not been unsatisfactorily low" in the *Permian* case cannot justify a holding as in *Permian* that "the Commission permissibly discounted the producers' reliance on the reserves to production ratio. The Commission's own

Staff Report on National Gas Supply and Demand issued in 1969 showed the ratio in 1968 to be 14.6 to 1, down from that noted in this Court's opinion of 18.7 to 1 in 1963 and 17.6 to 1 in 1965. The projection in said report for 1970 was a ratio of 12.8 to 1.

Further, the same report shows 1968 reserve additions were less than production that year, only 62% thereof, and a lesser percentage is shown by other sources in 1969.

The holding of *Permian* that just and reasonable rates under § 4(a) and § 5(a) of the *Act* can be so determined because they result in satisfactory levels of exploration, development and production, not merely because it is "somebody's idea of return on a 'rate base'" clearly points to the erroneous methodology used by the Commission in that case and here as evidenced by historical result. Those rates, and the rates here proposed have been and will be insufficient to permit satisfactory levels of exploration.

Further, such rates as here proposed, based on averaged costs with the attendant obligation for refund and reduced future revenue, will require a reduction in even the past level of exploration which for the last several years has been entirely inadequate.

In *Permian* the Court recognized the forceful argument that computation of rates from costs is ultimately circular, 390 U.S. at 816, FN 99, and assumed that the Commission will continuously examine both the premises of its regulatory method and the consequences for the industry's future of its rate-making orders. Such has not been accomplished here but with practical proof of the defects in its methodology the Commission has stubbornly refused to make a significant change.

CONCLUSION

For the foregoing reasons, this Conditional Cross-Petition for a Writ of Certiorari should be granted if this Court grants other petitions for writs as to the opinions and judgments of the Court of Appeals in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The within Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been served on all counsel of record by mailing three (3) copies thereof, air mail postage prepaid, in accordance with Rule 33(1) this 11th day of September, 1970, and upon the Solicitor General of the United States who acknowledges receipt of same.

Frank P. Saponaro

An Attorney for Cross-Petitioner

SUPREME COURT, U.S.

OCT 14 1970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 669, 680, 682, 683, 684, 685, 691, and 692

Southern Louisiana Area Rate Cases

MUNICIPAL DISTRIBUTOR GROUP, *ET AL.*,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

Supreme Court, U.S.
FILED
OCT 14 1970
E. ROBERT SEAVER, CLERK

MOTION OF UNITED DISTRIBUTION COMPANIES FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN RESPONSE TO PETITIONS NOS. 669, 680, 682, 683, 684, 685, 691, and 692 AND BRIEF AMICUS CURIAE FOR UNITED DISTRIBUTION COMPANIES IN OPPOSITION TO CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 669, 680, 682, 683, 684, 685, 691, and 692

Southern Louisiana Area Rate Cases

MUNICIPAL DISTRIBUTOR GROUP, *ET AL.*,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

MOTION OF UNITED DISTRIBUTION COMPANIES FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN RESPONSE TO PETITIONS NOS. 669, 680, 682, 683, 684, 685, 691, and 692

The following companies are herein referred to as United Distribution Companies:

AMERICAN NATURAL GAS SYSTEM
Michigan Consolidated Gas Company
Wisconsin Gas Company

CENTRAL ILLINOIS LIGHT COMPANY

CENTRAL ILLINOIS PUBLIC COMPANY

CITIZENS GAS AND COKE UTILITY

THE DAYTON POWER & LIGHT COMPANY

EQUITABLE GAS COMPANY

ILLINOIS POWER COMPANY

MICHIGAN GAS UTILITIES COMPANY

(List of Companies continued on next page)

COLUMBIA GAS SYSTEM
Columbia Gas of Kentucky, Inc.
Columbia Gas of Maryland, Inc.
Columbia Gas of New York, Inc.
Columbia Gas of Ohio, Inc.
Columbia Gas of Pennsylvania, Inc.
Columbia Gas of West Virginia, Inc.
Ohio Valley Gas Company
Virginia Gas Distribution Company

CONSOLIDATED NATURAL GAS SYSTEM
Consolidated Gas Supply Corporation
The East Ohio Gas Company
The Peoples Natural Gas Company
The River Gas Company
West Ohio Gas Company

CONSUMERS POWER COMPANY

NATIONAL FUEL GAS SYSTEM
Iroquois Gas Corporation
Pennsylvania Gas Company
United Natural Gas Company

NIAGARA MOHAWK POWER CORPORATION

NORTHERN ILLINOIS GAS COMPANY

ORANGE & ROCKLAND UTILITIES, INC.

THE PEOPLES GAS SYSTEM
North Shore Gas Company
The Peoples Gas Light & Coke Company

SOUTH CAROLINA ELECTRIC & GAS COMPANY

United Distribution Companies (UDC) is an *ad hoc*, voluntary group of 31 distribution utilities listed above serving approximately 10,300,000 customers at retail in the States of Illinois, Indiana, Kentucky, Maryland, Michigan, New York, Ohio, Pennsylvania, South Carolina, Virginia, and West Virginia. The principal cities and metropolitan areas wholly dependent on members of the United Distribution Companies group for their supplies of gas include Albany, Buffalo, Chicago, Cleveland, Columbus, Dayton, Detroit, Indianapolis, Milwaukee, Pittsburgh, and Syracuse. The population dependent upon the group of distribution companies is estimated to be 48,000,000 people. The United Distribution Companies Group represents approximately 25% of the gas distribution operations throughout the whole United States.

The bulk of the natural gas supplies of UDC is purchased from the major interstate pipeline companies, which in turn secure major portions of their supplies by

purchase from independent producers who operate in the *Southern Louisiana Area* and who are Respondents in the Southern Louisiana area rate cases here sought to be reviewed.

Because of the current and worsening gas shortage and of their inability to secure requisite supplies of additional gas from their pipeline suppliers, the United Distribution Companies are participating, as intervenors, in the new area rate proceeding now being conducted at Federal Power Commission Docket No. AR69-1.

Active participation in the new area rate proceedings at Docket No. AR69-1 during recent months has convinced the United Distribution Companies that the pressing supply problems facing the nation cannot adequately be dealt with and overcome solely through the prescription of higher prospective rates. Such companies are convinced that the problem can be dealt with fully and adequately only through reconsideration by the Commission of all rate and refund issues determined in its initial *Southern Louisiana Area* rate decision.

Through a brief *amicus curiae* submitted in connection with the petitions for rehearing, the UDC Companies urged the court below to remand the case to the Commission for further consideration in the light of the supply situation. While the court below affirmed the Commission, it reserved to the Commission the extraordinary power to reopen and change its order. And the issue now presented to this Honorable Court is whether this disposition by the court below should be reviewed or whether the Commission should first be permitted to reconsider and change its rate fixing order in the light of the supply situation.

United Distribution Companies believe the views they seek to present to this Court will contribute to a proper resolution of the troublesome issues before this

Court and for the benefit of the ultimate consumers for whom they seek to assure not only just and reasonable rates but also adequate supplies.

WHEREFORE, United Distribution Companies respectfully request this Court to permit them to file the brief *amicus curiae* which is submitted herewith.

Respectfully submitted,

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COMPANIES

October 14, 1970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 669, 680, 682, 683, 684, 685, 691, and 692

Southern Louisiana Area Rate Cases

MUNICIPAL DISTRIBUTOR GROUP, *ET AL.*,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

BRIEF AMICUS CURIAE FOR UNITED DISTRIBUTION COMPANIES IN OPPOSITION TO CERTIORARI

United Distribution Companies hereby submit their brief in opposition to the Petitions filed in Nos. 669, 680, 682, 683, 684, 685, 691, and 692 for writs of certiorari to review the judgment of the United States Court of Appeals entered in this case on March 19, 1970.

OPINIONS BELOW

The opinion of the Court of Appeals, which is included in Continental Appendix A, pp. 1-70, and its

opinion on petitions for rehearing, which is set forth in Continental Appendix B, pp. 1-3, are not yet reported.[1] The opinions of the FPC are reported at 40 FPC 530 and 40 FPC 301. The opinion of the hearing examiner is reported at 40 FPC 703.

JURISDICTION

The judgment of the Court of Appeals was entered on March 19, 1970, and modified and clarified by an order denying petitions for rehearing entered on June 16, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether this Honorable Court should issue its Writ of Certiorari to review the action of the Court of Appeals in this most extraordinary case, where (1) the Court of Appeals affirmed the rate fixing order of the Commission reluctantly and with "misgivings" in the light of a dangerous supply situation, (2) the Court of Appeals specifically authorized the Commission, as part of the remedy of the case, to reopen its rate order and make such adjustments therein as the "public interest" may require; and (3) the Commission has not yet had an opportunity to act in the public interest pursuant to the mandate of the Court of Appeals.

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[1] In No. 680, Continental Oil Company, *et al.*, Petitioners, filed appendices to their petition containing the complete text of opinions and judgments below as well as the agency's opinions and statues involved.

STATUTE INVOLVED

Sections 4(a), 4(e), 5(a), 16 and 19(b) of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717-717w, are involved and are reproduced at Continental Appendix F, pp. 1-8.

STATEMENT

The statement of Continental Oil Company *et al* at Docket No. 680 includes a full analysis of the decisions of the Federal Power Commission and of the Court of Appeals and for the sake of brevity we adopt that statement of the case, and make the following additional statements:

When petitions for rehearing were filed, the Court of Appeals questioning *inter alia* whether the Commission could modify the affirmed order since it does not have the power to make rates retroactively, directed the Commission to respond to questions as to whether: (a) the Commission could stay, modify, and rescind an order that had been affirmed; and (b) the Court had equitable powers to affirm while preserving the Commission's power to stay, modify, or rescind.

The Commission took the position that it would not have authority to make any retroactive increases or decreases in a rate order unless authorized to do so by the Court. It stated that the question with respect to "equitable powers" had not been decided. In conclusion: the Commission, by a 3 to 2 vote, requested the Court to remand the case so the Commission could discharge its responsibilities consistent with the Court's opinion.

On the petitions for rehearing, the Court again affirmed the order and stated:

> "We wish to make crystal clear the authority of the Commission in this case to reopen any

part of its order that circumstances require be reopened. Under section 19(b) of the Natural Gas Act, this Court has the broad remedial powers that inhere in a court of equity, and pursuant to our equitable powers we make it part of the remedy in this case that the authority of the Commission to reopen any part of its orders, including those affecting revenues from gas already delivered, is left intact. The Commission can make retrospective as well as prospective adjustments in this case if it finds that it is in the public interest to do so.

"At the same time, we emphasize that our judgment is an affirmance and not a remand. The appropriate place for originally considering what parts of the orders must be reopened in the light of new evidence is before the Commission. It may be that the Commission will decide that the refunds it has ordered are just and reasonable or at least that their significance to the public interest is outweighed by the confusion and delay that would result from their reopening. In this event, the Commission will allow its refund orders to stand as they are. Or it may be that the refunds are too burdensome in light of new evidence to be in the public interest. In that case, it is our judgment that the Commission shall have the power and the duty to remedy the situation by changing its orders.

"In all other respects, the original opinion of this Court is the final disposition of this appeal."

Promptly after issuance of the Court's order on June 16, 1970, the Commission entered an order on July 2, 1970, staying its own orders, effective upon dissolution of the Court's stay. Such order is still in effect.

United Distribution Companies have been active in hearings before the Commission in the new *Southern Louisiana Area Rate Case*, AR69-1. Executives of the various United Distribution Companies have testified with respect to the present gas shortage. A United Distribution Companies witness from the financial community also has testified with respect to the enormous capital requirements of the energy industries if the energy requirements of this country are to be met during this decade.

United Distribution Companies propose to participate actively before the Commission in any reopening of the *Southern Louisiana Area Rate Case* here under review.

ARGUMENT

In the presence of the natural gas shortage now facing the Nation, we cannot sufficiently emphasize the importance of this case to natural gas distribution utilities, to the millions of consumers dependent upon them for utility service, and indeed to the public welfare.

The rates fixed for the Southern Louisiana Area must be adequate to provide producers with an incentive to devote immense new quantities of capital to exploration and development and bring the necessary new supplies into the interstate market. A wrong decision upon any part of this whole problem, including the ordering of unduly burdensome refunds, can have disastrous consequences for the interstate consumers.

When the hearings in the *Southern Louisiana Area Rate Case* concluded more than five years ago, hardly anyone foresaw the current gas supply shortage. Although some signs of an impending gas shortage were visible by the time the Commission issued the Opinions and Orders now under review, the full magnitude of the problem was not readily apparent.

By the time that the case reached the Court of Appeals on review, however, the situation had been somewhat clarified. *A Staff Report on National Gas Supply and Demand*, issued in September 1969, was before the Court; and the Court refers to fact that it shows; "perhaps a certainty, that the supply of gas is dangerously low" (Continental Appendix A, p. 52).

The Court of Appeals recognized that this Court held in *Permian* (*Permian Basin Area Rate Cases*, 390 US 747 (1968)) that "adequate findings" would be required in the future, but noted that the Commission had left gaps similar to the omissions criticized by this Court in *Permian*. Thus, the Court of Appeals found ". . . the Commission failed to approach supply and demand in either a semi-quantitative or qualitative way" (Continental Appendix A, pp. 49-50), and listed defect after defect in "findings" on related questions of supply, demand, and actual availability of capital to the industry at rates prescribed (Continental Appendix A, pp. 52-69). The court also noted existence of more current data available to the Commission, including the study by the Commission's Staff released in September, 1969, which indicates "perhaps a certainty, that the supply of gas is dangerously low" and "a serious shortage, in fact, may already be unavoidable" (Continental Appendix A, p. 52). In sum, the court found that the assessment of the crucial facts as to supply, demand, and impact of prescribed rates called for by *Permian* had not been made in this case.

The Natural Gas Act, in addition to obligating the Commission to fix "just and reasonable" rates, requires that rates be fixed at levels consistent with the maintenance of an adequate level of service. *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378 (1959). The Commission, thus, has a duty to set rates at levels which will obtain the gas needed by interstate consumers. But, it is apparent that the ceiling prices established for the Southern Louisiana Area are inadequate to meet the projected demands. Higher prices will play a vital role in encouraging producers to search for, develop, and produce new reserves and in inducing them to dedicate such reserves to the interstate marketplace. Conversely, price "rollbacks" and unduly burdensome refunds will discourage these activities by drawing off capital badly needed for the expansion of exploration and production.

If the rates fixed under Opinion Nos. 546 and 546-A are placed into effect, it is estimated that the producers will be required immediately to refund $375 million at a time when capital is scarce and expensive.[2] To impose such an obligation on the producing industry would drastically reduce the already limited amount of new capital needed to finance new exploratory ventures and would accentuate the present shortages.

The opinions of the Court of Appeals are shot through with expressions of concern over the worsening supply situation and over the probability that the ordered rates and refunds will not provoke its correction. Plainly, the court concluded that further Commission action, through the application of its expertise to the

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[2] The Commission order was based primarily on 1960 data and did not give material recognition to the inflation of the 1960s. The gas requirements of the 1970s cannot be met at the revenue levels of the late 1950s.

developed demand and supply problem, is the best and most effective manner of responding to the situation in the public interest.

Plainly, also the Commission, in the light of the Staff Report and other data now available, shares this deep concern and desires to act, for it requested a remand of the case.

In our opinion, further action by the Commission, well grounded on proper findings as to the supply and demand problem, and as to the bearing of rates and refunds upon its solution, is essential in the public interest; and, until such action is taken, we believe that further review of the case is premature.

WHEREFORE United Distribution Companies respectfully suggest that the public interest will be best served if this Honorable Court denies the Petitions for Writs of Certiorari presented herein.

Respectfully submitted,

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October 14, 1970

CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed a copy of the within Motion and Brief *Amicus Curiae* to the Federal Power Commission and to each of the Petitioners for Writs of Certiorari in the above dockets.

C. William Cooper

October 14, 1970

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
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Nos. 680, ET AL.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

CONTINENTAL OIL COMPANY, ET AL.,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

RESPONSE OF E. COCKRELL, JR. TO PETITIONS IN NOS. 680, 681, 682, 683 AND 685

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FIDELITY PRINTING COMPANY, INC., HOUSTON

Nos. 680, et al.

In The

Supreme Court of the United States

October Term, 1970

Continental Oil Company, et al.,
Petitioners,

v.

Federal Power Commission,
Respondent.

RESPONSE OF E. COCKRELL, JR. TO PETITIONS IN NOS. 680, 681, 682, 683 AND 685

E. Cockrell, Jr. (Cockrell), a respondent in Nos. 669, 691 and 692, and a petitioner in No. 684, hereby responds to the petitions in Nos. 680, 681, 682, 683 and 685, which such latter petitions also seek writs of certiorari to review the judgment and opinions entered by the United States Court of Appeals for the Fifth Circuit in this same case on March 19, 1970, and June 16, 1970. In response to these petitions, Cockrell would show as follows:

1. In Nos. 669, 691 and 692, Cockrell is filing a brief opposing such petitions.

2. In Nos. 680, 681, 682, 683 and 685, Cockrell does not oppose the granting of such petitions. In the event such

petitions are granted, Cockrell would be aligned with the petitioners and not with the respondent Federal Power Commission.

Respectfully submitted,

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Nos. 680, ET AL.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

CONTINENTAL OIL COMPANY, ET AL.,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

RESPONSE OF BRADCO PROPERTIES, INC., et al., TO PETITIONS IN NOS. 680, 681, 682, 684 AND 685

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U. S. OIL OF LOUISIANA, LTD.

October 14, 1970

FIDELITY PRINTING COMPANY, INC., HOUSTON

Nos. 680, et al.

In The

Supreme Court of the United States

October Term, 1970.

Continental Oil Company, et al.,
Petitioners,

v.

Federal Power Commission,
Respondent.

RESPONSE OF BRADCO PROPERTIES, INC., et al., TO PETITIONS IN NOS. 680, 681, 682, 684 AND 685

Bradco Properties, Inc., Freeport Sulphur Company, John W. Mecom, Lake Washington Inc., U. S. Oil of Louisiana Inc. and U. S. Oil of Louisiana, Ltd. (Bradco, *et al.*), respondents in Nos. 669, 691 and 692, and petitioners in No. 683, hereby respond to the petitions in Nos. 680, 681, 682, 684 and 685, which such latter petitions also seek writs of certiorari to review the judgment and opinions entered by the United States Court of Appeals for the Fifth Circuit in this same case on March 19, 1970, and June 16, 1970. In response to these petitions, Bradco, *et al.*, would show as follows:

1. In Nos. 669, 691 and 692, Bradco, *et al.*, are filing a brief opposing such petitions.

2. In Nos. 680, 681, 682, 684 and 685, Bradco, *et al.*, do not oppose the granting of such petitions. In the event such

petitions are granted, Bradco, *et al.*, would be aligned with the petitioners and not with the respondent Federal Power Commission.

Respectfully submitted,

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U. S. OIL OF LOUISIANA, LTD.

October 14, 1970

SUPREME COURT, U. S.
OCT 14 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 669, 680, 681, 682, 683, 684, 685, 691 and 692

MUNICIPAL DISTRIBUTOR GROUP, ET AL., *Petitioners,*

v.

FEDERAL POWER COMMISSION, ET AL., *Respondents.*

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT, PIPELINE PURCHASER GROUP

(Southern Natural Gas Company, Tennessee Gas Pipeline Company, Texas Gas Transmission Corporation, Texas Eastern Transmission Corporation, Transcontinental Gas Pipe Line Corporation, Trunkline Gas Company, United Fuel Gas Company, United Gas Pipe Line Company)

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October 14, 1970

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 669, 680, 681, 682, 683,
684, 685, 691 and 692

MUNICIPAL DISTRIBUTOR GROUP, ET AL., *Petitioners*,

v.

FEDERAL POWER COMMISSION, ET AL., *Respondents*.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT PIPELINE PURCHASER GROUP

Respondent Pipeline Purchaser Group[1] opposes the petitions for writ of certiorari in the above-captioned nine causes, all of which relate to the judgment of

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[1] The Pipeline Purchaser Group sought judicial review below but is solely a respondent here. The group consists of eight interstate pipeline purchasers, Southern Natural Gas Company, Tennessee Gas Pipeline Company, Texas Gas Transmission Corporation, Texas Eastern Transmission Corporation, Transcontinental Gas Pipe Line Corporation, Trunkline Gas Company, United Fuel Gas Company, and United Gas Pipe Line Company.

the United States Court of Appeals for the Fifth Circuit entered on March 19, 1970, because under present circumstances the petitions are premature.

OPINIONS BELOW

The opinion of the Court of Appeals dated March 19, 1970, and its opinion on petitions for rehearing dated June 16, 1970, are not yet reported but have been printed as appendices to Continental Oil Company's petition in No. 680, Appendix A, pages 1-70 and Appendix B, pages 1-3, respectively. The opinions and orders of the Federal Power Commission are reported at 40 FPC 530, and 41 FPC 301, respectively.

JURISDICTION

Petitioners have sought to invoke the jurisdiction of this Court under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

In light of the opinions and judgment below, and the active status of related proceedings being heard by the Federal Power Commission ("Commission") in Docket Nos. AR 69-1, *et al.*, the Pipeline Purchaser Group believes all petitions for writs of certiorari in this case to be premature. Therefore, in our view the question actually presented is:

> Whether it is premature for this Court to review at this time procedural and substantive matters raised by petitioners, since the court below preserved to the Commission the responsibility for determining, in the first instance, the manner in which the recently recognized shortage of natural gas should be treated in prescribing producer rates—an undertaking the Commission is vigorously pursuing in proceedings which have not yet been concluded.

STATEMENT OF THE CASE

Although the petitions adequately describe the general history of the case, they do not focus sharply upon the problem with which the court below, and even more directly the Commission, was confronted.

This proceeding, the second initiated by the Commission under its program to regulate the rates of independent producers of natural gas through area ratemaking, commenced in May, 1961. At that time, and throughout the evidentiary stages of this proceeding, natural gas supplies from the Southern Louisiana area were adequate to meet consumer requirements, although the margin of safety was progressively narrowing.

By the time the Commission issued its decision, Opinion No. 546, on September 25, 1968, the shortage had reached the point at which interstate pipeline purchasers were unable to purchase currently the supplies of gas needed to meet their growing market requirements. Accordingly, when Opinion No. 546 was issued, the Pipeline Purchaser Group filed with the Commission a motion requesting the opportunity to bring to its attention tangible facts as to the gas supply problem, certain in the knowledge that the situation would deteriorate sharply unless the Commission took remedial steps through modification of the recently issued rate order. (R. 398858). Other parties made similar requests.

Although the Commission did not then apprehend the extent to which the gas supply shortage had overtaken the industry, and so did not reopen the proceeding for evidence as to this critical problem, it sought to resolve the issue by initiating another area rate

proceeding for Southern Louisiana, on the same day it denied rehearing in the instant proceeding. The new area rate proceeding, Docket No. AR 69-1, has been moving forward on an accelerated basis throughout the period the instant matter has been under judicial review.

Also, the Commission did not make effective the rate levels provided in its order in the instant proceeding, nor require the payment of refunds based upon such rate levels.[5] In part, this is the result of stay orders issued by the Commission and the court below, and in part it is attributable to the fact that the Commission has not deemed it timely to order such actions.

As the hearings in the new area rate proceeding were commencing, the Commission enlarged the subject matter, initially relating only to offshore regions of the Southern Louisiana area, so as to embrace the onshore regions as well.[6] Thus, the Docket No. AR 69-1 proceeding applies to the entire Southern Louisiana area, and to all vintages of gas, as well as to the appropriate price level for future discoveries.

The Pipeline Purchaser Group, while actively participating in the Docket No. AR 69-1 proceedings, also petitioned for judicial review in the United States Court of Appeals for the Fifth Circuit, urging that the Commission be directed to relate its Southern Louisiana rate order to the eliciting of adequate gas supplies for consumer needs, in light of current conditions.

Without detailing the steps leading to the judgment of the Court of Appeals, it is sufficient for present purposes to note that the Commission ulti-

mately requested a remand, and the court below undertook to assure petitioners and other parties that the Commission would be free to take such action as it deemed necessary to counteract the gas supply shortage. The Commission is currently attempting to do so with active cooperation of almost all the parties, including those involved in this litigation.

As recognized by the court below, the members of the Pipeline Purchaser Group appear in the instant matter solely in their role of purchasers and transporters of Southern Louisiana gas, and their alignment results from the fact that "they are concerned that the price level will not elicit sufficient supply for their needs" (Continental Appendix A, page 2). This is true with respect to this Brief in Opposition as well.

We urge the Court to permit the Commission to proceed as rapidly as possible to resolve the entire pricing problem for the Southern Louisiana area so as to ameliorate what has become a critical gas shortage of nation-wide proportions. This objective can be attained most directly and expeditiously through denial of the petitions for writs of certiorari as prematurely brought.

ARGUMENT

I.

In Its Present Posture, Supreme Court Review of the Judgment Below Would Be Premature

The petitions for writs of certiorari variously seek to question (1) the ratemaking formulae applied by the Commission, some contending that the resultant rates were too low (Nos. 680, 681, 683, 684, 685), and another petitioner contending that they were too high (No. 692); or (2) the procedure employed by the court

below for the purpose of enabling the Commission to implement its rate order if it saw fit while preserving the Commission's authority to modify the order if needed (Nos. 669, 691). Petitioner in No. 692 seeks further review as to both aspects. Finally, the major producer group, Texaco, *et al.*, has conditionally cross-petitioned in No. 681, recognizing prematurity but seeking the right to raise substantive issues in the event certiorari should be granted as to other petitions.

In our view, because of the particular circumstances involved, this case in its present posture presents no issue which is ripe for review. Until the Commission takes further action, which would of necessity be subject to appellate review, no party can be finally affected by the judgment below. And, until the Commission acts, no party can foretell which issues, if any, will ultimately be relevant.

Thus, although it is understandable that parties wish to protect their future positions, or even to obtain judicial sanction for those positions, neither of these objectives calls for affirmative action by the Court at this time.

What is required, we submit, is that the Commission be permitted to take such action as *it* finds to be appropriate in meeting the natural gas shortage in this all-important producing region, and to do so as soon as physically possible. This is so clearly required—and so patently an administrative function—that judicial intervention at this point is neither necessary nor appropriate. It will be time enough to review the court's procedural determination as well as the Commission's substantive ratemaking formulae when an administrative order has been entered dealing comprehensively with all these matters.

As noted above, the Commission instituted a new area rate proceeding in Docket No. AR 69-1 on March 20, 1969, the same day that it denied rehearing in the instant cause. Although initially limited to more recent vintages of gas from the offshore region of Southern Louisiana, the scope of the proceeding was enlarged on December 15, 1969, to embrace *all* vintages of gas from *all* regions of Southern Louisiana.

That proceeding, which none of the petitioners has sought to abort, is presently in a very advanced evidentiary hearing stage and settlement negotiations are progressing concurrently. Since one of the principal objectives of the proceeding is to come to grips with the economic aspects of the current gas shortage, there is every reason to allow that proceeding to be concluded, and no substantial reason to destroy it through piecemeal review of various portions of its subject matter.

The petitions in Nos. 669, 691 and 692 set forth various allegations regarding the impact of the judgment below as to potential refunds, but the facts are that the Commission has never entered an order requiring the payment of refunds in this proceeding. Nor does the court's action in any way preclude ultimate refunds. Contrary to the views expressed in those petitions, the principal issue below, related to the rate levels which should have been prescribed—but both the Commission and the Court of Appeals have been at pains to maintain maximum flexibility for the ultimate determination of those rate levels by the Commission.

Since there is no reason to believe that the Commission will shirk its responsibility, and on the con-

trary, there is every indication that it is seeking to arrive at a fair and efficacious solution to a very complex problem, it clearly should not now be hampered or foreclosed.

Finally, with regard to the procedural matters, it is not at all clear that the court's reference to the Commission's freedom to make "retrospective as well as prospective adjustments in this case" would sanction "reparations" or "retroactive ratemaking" as some petitioners suggest. In the first place, as explained above, the Commission's original rate order was never implemented, so this is not an instance of rates having been made effective and later changed, *nunc pro tunc*. Moreover, since the Commission has not taken definitive action in this regard, there is no basis for contending that it has acted unlawfully.

If, in fact, the consequence of the judgment below, or the Commission's action in pending proceedings, were to result in "reparations" or "retroactive ratemaking", the Pipeline Purchaser Group would urge that certiorari be granted and the decision of the court below summarily reversed with directions to remand to the Commission for full reconsideration in light of the critical gas shortage. But, in our opinion, nothing of this nature has occurred.

Thus, both as to the substantive aspects and the procedural questions, the petitions for writs of certiorari present no issue which must, or should be, resolved at this time. The entire subject matter should remain, or be placed, in the hands of the Commission for a definitive determination at the earliest possible time.

CONCLUSION

Wherefore, for the foregoing reasons, the Pipeline Purchaser Group requests that all petitioners for writs of certiorari in these proceedings be denied.

Respectfully submitted,

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October 14, 1970

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Nos. 680, 682, 683, 684, and 685

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 680, *et al.*

CONTINENTAL OIL COMPANY, ET AL.,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MEMORANDUM FOR TEXACO INC., *ET AL.*, IN RESPONSE TO PETITIONS IN NOS. 680, 682, 683, 684, and 685

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 680, *et al.*

CONTINENTAL OIL COMPANY, ET AL.,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MEMORANDUM FOR TEXACO INC., *ET AL.*, IN RESPONSE TO PETITIONS IN NOS. 680, 682, 683, 684, and 685

Texaco Inc., *et al.*, (Texaco, *et al.*), Respondents in Nos. 669, 691, and 692, and Conditional Cross-Petitioners in No. 681, hereby respond to the petitions in Nos. 680, 682, 683, 684, and 685, which also seek writs of certiorari to review the judgment and opinions entered by the United States Court of Appeals for the Fifth Circuit in this same case on March 19, 1970 and June 16, 1970. In response to these petitions, Texaco, *et al.*, state:

1. In Nos. 669, 691, and 692, Texaco, *et al.*, are filing a brief opposing the petitions on grounds of prematurity and on other grounds specifically directed to questions presented in those petitions. In Nos. 680, 682, 683, 684, and 685, Texaco, *et al.*, also oppose the granting of the

petitions on the grounds of prematurity set forth in their Brief in Opposition in Nos. 669, *et al.*, at pp. 7-11.

2. In the event the petitions in Nos. 680, 682, 683, 684, and 685 were granted, Texaco, *et al.*, would be aligned with the petitioners and not with the Respondent Federal Power Commission. While these five petitions raise several issues not raised by Texaco, *et al.*, these petitions also raise the four questions set forth in the Conditional Cross-Petition filed by Texaco, *et al.*, in No. 681. As to these questions, Texaco, *et al.*, therefore would be aligned on the merits with petitioners in Nos. 680, 682, 683, 684, and 685.

3. In the event the petitions in Nos. 669 and all related cases were granted, Texaco, *et al.*, would not oppose the request of Petitioner The California Company in No. 682 that the case then be "summarily remanded to the Court below with instructions to direct the Commission to reopen the case and proceed to such orders as it deems in the public interest."

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1970

Nos. 680, 681, 682, 683, 684, 685

CONTINENTAL OIL COMPANY, et al.,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent.

(Continued on inside cover)

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT, MUNICIPAL DISTRIBUTOR GROUP

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TEXACO, INC., et al.,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent.

THE CALIFORNIA COMPANY, A DIVISION OF CHEVRON OIL COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

BRADCO PROPERTIES, INC., et al.,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent.

E. COCKRELL, JR.,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

THE SUPERIOR OIL COMPANY,

Cross-Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 680, 681, 682,
683, 684, 685

CONTINENTAL OIL COMPANY, et al.,[1]

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT, MUNICIPAL DISTRIBUTOR GROUP[2]

[1] The Federal Power Commission was the only named respondent in the petitions; however, under this Court's rules, the petitioners must name all other parties to the proceeding below as respondents. (Rule 21, par. 4). The Municipal Distributor Group (MDG) was a party to the proceeding before the Commission and the Court of Appeals for the Fifth Circuit and was served with a copy of the petitions. The MDG, therefore, is a respondent, though not named in the petitions. MDG has also filed a petition for writ of certiorari (No. 669) limited solely to the question of whether the Commission may retroactively revise the rates affirmed by the court below.

[2] The Municipal Distributor Group comprises Memphis Light, Gas and Water Division operating municipal gas, electric and water systems in Memphis, Tennessee, and surrounding Shelby County, Tennessee, nine other Tennessee public systems, and American Public Gas Association, having a membership of 201 public systems operating in 28 states.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Fifth Circuit and its Opinion on petitions for rehearing are not yet reported. They are printed respectively in Appendices A (pp. 1-70) and B (pp. 1-37) to the petition of Continental Oil Company and Mobil Oil Corporation in No. 680. The opinions and orders of the Federal Power Commission are reported at 40 FPC 530 and 41 FPC 301, and are printed as Appendices D (pp. 1-256) and E (pp. 1-112) to Continental Oil Company's petition.

JURISDICTION

The judgment of the Court of Appeals, printed as Appendix C to the petition of Continental Oil Company and Mobil Oil Corporation was entered on March 19, 1970. The Court of Appeals denied the petitions for rehearing by an opinion issued June 16, 1970 (App. B, pp. 1-3). The mandate was issued July 14, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether the Court of Appeals was correct in affirming the Federal Power Commission's opinions and orders.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w, are set out in Appendix F to the petition of Continental Oil Company and Mobil Oil Corporation.

STATEMENT

PROCEEDINGS BEFORE THE COMMISSION

In May 1961, the Federal Power Commission ("Commission") initiated an investigation to determine and fix the just and reasonable ceiling rates for all sales by independent producers of natural gas in interstate commerce from Southern Louisiana, including the area offshore Louisiana in the Gulf of Mexico[3] (App. D, p. 6; 40 FPC 542). The Commission has described this area, particularly the offshore area, as constituting at the present time and for the foreseeable future a principal area of development of natural gas in the United States (App. D, pp. 6, 10-12; 40 FPC 542, 544-46).

The Commission initiated the investigation under Section 5(a) of the Natural Gas Act (Act)[4] and named as respondents 252 natural gas producers. The Commission also consolidated with the proceedings 199 Section 4(e)[5] proceedings involving 70 of the 252 producers (App. D, p. 6; 40 FPC 542). Numerous distributors of natural gas, private and public, interstate natural gas pipeline companies, state regulatory commissions, other interested parties, and the Commission's Staff participated in the proceedings.

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[3]The Commission has defined this area to include all parts of the State of Louisiana south of the thirty-first parallel, including all areas, both State and Federal, in the Gulf of Mexico off the shore of Louisiana. (App D, p. 6; 40 FPC 542).

[4]Section 5(a) clothes the Commission with the authority to initiate rate investigations on its own motion and, after hearing, to fix just and reasonable rates which are to be prospectively effective, i.e., from and after the date of issuance of the Commission's order fixing the just and reasonable rates (App. F, pp. 3-4).

[5]Section 4(e) proceedings resulted from the unilateral filing of notices of rate changes by producers under Section 4(d) of the Act. When filed they are subject to suspension for a five-month period, and if the rate investigation thereby initiated is not concluded at the end of the suspension period, the increased rates may be made effective subject to refund. (App. F, pp. 2-3).

Prehearing conferences and other meetings were held in an effort to bring the massive proceedings within manageable proportions. After these conferences and meetings had taken place, the cases-in-chief were prepared and served in advance of hearing and were placed in evidence on December 10, 1963. Rebuttal evidence was placed in evidence on March 24, 1964. Cross-examination commenced on April 23, 1964.

The hearings, with recesses, continued until the record was closed on November 5, 1965. The hearings produced a transcript of more than 34,000 pages, about 300 exhibits (most of them voluminous), and many items by reference (for the most part also voluminous).

The Presiding Examiner's decision was issued December 30, 1966 (III J.A. (1) 62d-447d, 40 FPC 703-902). With some exceptions the Examiner adhered to the Commission's *Permian* opinion (*Area Rate Proceeding*, Docket No. AR61-1, Opinion No. 468, 34 FPC 159, affirmed *Permian Basin Area Rate Cases*, 390 U.S. 747. He recommended maximum just and reasonable rates, depending on vintage and whether offshore or onshore production, of 16.75¢ to 19.5¢ per Mcf. After hearing oral argument *en banc*, on May 15 and 16, 1967, the Commission on September 25, 1968 issued its Opinion No. 546 and accompanying order (App. D, pp. 1-258, 40 FPC 530-702).[6] After consideration of applications for rehearing and motions to reopen, the Commission on March 20, 1969 issued its supplemental Opinion No. 546-A and accompanying order (App. E, pp. 1-112; 41 FPC 301). By the supplemental opinion and order, the Commission modified the original opinion and order in

[6] The decision was issued after this Court on May 1, 1968 had sustained in their entirety the rate orders issued by the Commission in its first effort to fix producer rates on an area, rather than an individual company, basis. The first proceeding involved the Permian Basin. *Area Rate Proceeding*, Docket No. AR61-1, 24 FPC 1121 (1960), affirmed, *Permian Basin Area Rate Cases*, 390 U.S. 747 (May 1, 1968).

part, denied the motions for stay filed by many producers, and in all other respects denied the applications for rehearing.

THE COMMISSION'S OPINIONS NO. 546 AND 546-A AND ACCOMPANYING ORDERS

The Commission established three vintages of natural gas and established the following as the just and reasonable ceiling rate for each vintage (App. D, p. 9; 40 FPC 544):[7]

Vintage	Rate	
	On Shore	Off Shore
	(cents per Mcf)	
All casinghead or oil well[8] gas (gas produced in association with oil) and pre-1961 gas-well gas (including residue gas derived from it) [old or flowing gas-well gas]	18-1/2	17
Gas-well gas sold under contracts dated January 1, 1961 through September 30, 1968 [new gas-well gas]	19-1/2	18
Gas-well gas sold under contracts dated October 1, 1968 or later [new gas-well gas]	20	18-1/2

[7]The Commission fixed January 1, 1961 as the date of division between "new gas-well gas and old gas-well gas". The latter type is also called "flowing gas" by the Commission (App. D, pp. 27-8; 40 FPC 555).

[8]The Commission found that casinghead gas is discovered largely as a product of the search for oil and therefore exploration for it could not be encouraged by awarding such gas the higher second and third vintage rates. The Commission, for this reason, fixed the rates for casinghead gas irrespective of vintage at the first vintage rates (App. D, pp. 85-6; 40 FPC 590-91).

The difference between on-shore and off-shore prices of 1-1/2 cents per Mcf represented the Commission's allowance in on-shore gas prices for Louisiana severance tax (App. D, p. 9; 40 FPC 544).

All of the prices were subject to upward and downward adjustment for heating value (Btu content) and the third vintage rates were also subject to reductions in the event of deviation from specified quality standards.

The rates for second vintage gas-well gas and the even higher rates for third vintage gas were awarded to elicit supply and to encourage continuation of necessary exploration and development.

With respect to rates collected by producers under Section 4(e) of the Act, the Commission rules that refunds would be required by further order of the Commission of the difference between the just and reasonable rate prescribed in Opinion No. 546 and the rate collected subject to refund (App. D, p. 143; 40 FPC 626). With respect to all other rates, the Commission ordered that the collection of rates in excess of the applicable area rate established in Opinion No. 546 from and after September 25, 1968, the effective date of the opinion, shall be subject to refund, plus interest at 7 percent.

The Commission ordered that these ceiling prices would be subject to change only in accordance with the procedure prescribed in Opinion No. 546. Under the procedure there prescribed, any seller seeking to charge rates in excess of the ceiling prices or requesting a change thereof must file a petition for waiver of the Commission-prescribed price and must justify fully the relief sought (App. D, p. 182; 40 FPC 650). Unless and until the Commission grants the petition, the seller may not file rate increases in excess of the applicable area rate prescribed in Opinion No. 546 (App. D, p. 182; 40 FPC 650). These rate-change provisions have been commonly described as prescribing an indefinite moratorium on rate changes.

The Commission's opinion departed from *Permian*, affirmed by this Court in full four months earlier, in a major respect. In *Permian*, the rates prescribed by the Commission were based directly on the costs, including a fair rate of return, determined by the Commission. In the present case, however, the Commission added a series of bonuses or cushions to each category of costs with the result that the rates prescribed were above the cost determinations, including rate of return, of up to 2¢ per Mcf. Consequently, although the prescribed rates were nominally based on a 12 percent overall rate of return on rate base, yielding approximately 13.3 percent return on common stock equity (App. D, pp. 67-8, 104; 40 FPC 579, 601), as the Commission conceded in the court below (Br. for FPC, p. 21, note 12) and the court below found (App. A, p. 40, note), the increments over cost increased the rate of return to more than 14 percent for Louisiana taxed gas (onshore) and to more than 16 percent for untaxed offshore gas.

After consideration of applications for rehearing the Commission on March 20, 1969 issued its Opinion No. 546-A and accompanying order modifying in part and confirming in part Opinion No. 546 and order.

The Commission re-affirmed that the rates established in Opinion No. 546 were just and reasonable. The Commission, however, while re-affirming that 18.5 cents per Mcf was the just and reasonable rate for offshore third vintage gas, exempted such gas from the rate change procedure prescribed by the Commission and authorized producers of such gas to file for contractually authorized increases up to 20 cents per Mcf, subject to suspension and possible refund (App. E, pp. 3-6; 41 FPC 306-07). The Commission also limited the application of the rate change procedures for third vintage on-shore gas sales to a five year period ending January 1, 1974 (App. E, pp. 7-8; 41 FPC 308-09).

Concurrent with the denial of all petitions for rehearing, the Commission initiated a second area rate proceeding at Docket No. AR69-1, limited to certain specified Southern

Louisiana offshore production areas, for the purpose of investigating the allegations of a gas shortage and cause therefor, if one in fact did exist, and to review the rates prescribed for such areas, and, if necessary, to prescribe new rates (App. E, pp. 4-5, 41 FPC 306; 41 FPC 378).[9] Referring to the new rate investigation, at that time limited to offshore production areas in the Federal domain, the Commission said (App. E, pp. 4-5):

> Many of the petitions for rehearing filed by the producers herein, and the motion for further argument filed by the Pipeline Group on November 22, 1968, devote primary attention to the basic question of the adequacy of present gas supplies to meet the increasing demands for natural gas and the adequacy of the rates established in Opinion 546 to elicit the future exploration, development and dedication necessary to meet this demand. No probative showing, based on the record before us, has been made in any such pleadings indicating that the prices we have established will be inadequate to bring forth the optimum degree of effort by the industry. However, the pleadings do lead us to the conclusion that the vital importance of future additional gas supply from the offshore areas in Southern Louisiana warrants the immediate commencement of the further proceeding we had contemplated in our original Opinion herein looking towards a possible revision of the area price ceilings for such gas.

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[9] Subsequently, by order issued December 15, 1969, the Commission enlarged Docket No. AR69-1 to include all offshore and onshore Southern Louisiana production areas with the result that the new proceeding became a second round area rate proceeding for Southern Louisiana reaching all rates prescribed in the present case. The new area rate proceeding is now in progress before a Presiding Examiner, any new rates prescribed would be effective from and after the issuance of a final rate order, consistent with the Commission's authority to fix rates prospectively only. *Sections 4(e) and 5(a); Hope Natural Gas v. FPC* (CA 4, 1952), 196 F.2d 803.

Petitions for review were filed in several courts of appeals within minutes of each other after public issuance by the Commission of its Opinion No. 546-A and order. The filing of a petition in the court below being first in time, review jurisdiction vested in that court. Petitions for review filed by producers and pipeline companies challenged the prescribed rates as too low and petitions for review filed by consumer representatives challenged them as too high.

By order of May 13, 1969, the court below granted a stay until hearing on the merits in June 1969, with this stay to expire no later than July 1, 1969. Thereafter, upon numerous producer requests for a later hearing, a conference was convened by the court below to consider these requests. As a consequence, the oral argument was postponed until October 6, 1969 and the Commission, at the court's request, stayed the ordered rate reductions (but no other aspects of its order) until October 13, 1969. The oral argument was held on October 6, 1969, before a panel of the court below which subsequently, by order issued October 17, 1969, vacated the submission of the cause to that panel and reassigned the case for argument and determination before an entirely new panel of judges of the same court. The stay of the Commission's orders was continued. The new panel heard oral argument on December 17, 1969.

Thereafter, on March 19, 1970, the Court below filed its opinion and judgment sustaining in full the Commission's opinions and orders (App. A, p. 69). While expressing less than "full satisfaction" with the Commission's "performance", both with respect to producer and consumer positions, the Court below rejected producer and consumer objections to the orders and found them to be sustained by substantial evidence and free from legal error, recognizing in this connection "that the process of producer regulation is a difficult one that the Commission must have latitude to adapt to changing conditions" (App. A, pp. 2-3, 10, 20-21, 24, 29-30, 40). The court below went on to say that its mandate "should not, however, be interpreted to inter-

fere with Commission action that would change the rates we have approved here." (App. A, p. 69).

Petitions for rehearing were filed by the producer and pipeline petitioners. These petitioners, *inter alia*, agreed that the Commission, notwithstanding affirmance, may modify its orders for the future and the rates to be charged prospectively; but expressed grave doubts that the Commission could revise the rates prescribed in Opinion No. 546, as modified by Opinion No. 546-A, retroactively. Producer and pipeline petitions for rehearing, therefore, urged the court below, as a means of preserving the Commission's authority to revise the rates retroactively, to grant rehearing, and upon such rehearing, to either instruct "the Commission to make further findings on issues deemed deficient by the Court" or to "grant the Motion for Leave to Adduce Additional Evidence heretofore filed" (e.g., Petition for Rehearing of Humble Oil & Refining Company and Humble Gas Transmission Company, pp. 3, 9; Amerada Hess, et al., pp. 2-3, 9-10).

On May 11, 1970, the court below directed the Commission and other parties to the review proceedings to respond to two questions:

> (1) Whether the Federal Power Commission has authority to stay, modify, or rescind an order once that order has been affirmed by this Court, if circumstances appearing since the entry of the order seem to make these actions advisable.
>
> (2) Whether this Court may, in the exercise of its equitable powers, affirm an order of the Commission while preserving the authority of the Federal Power Commission to stay, modify, or rescind the order if the circumstances seem to make these actions advisable.

Responses were filed by MDG, the New York Public Service Commission, Associated Gas Distributors (a group of private distributors of natural gas), and the Commission.

All responses agreed that following affirmance of the Commission's orders, the Commission would not have the power under the Natural Gas Act to revise retroactively the prescribed rates. The Commission also responded that the extent of the Court's equitable powers under Section 19(b) of the Natural Gas Act "apparently has not been decided" and that the extent to which the court's equitable powers "would transcend these statutory powers would be determined by" the court below. Over the vigorous dissent of Commissioner O'Connor, joined by Chairman Nassikas, the Commission by a 3 to 2 vote, concluded its response with an about-face request for remand, unaccompanied by any explanation.

The Municipal Distributor Group, the Associated Gas Distributors and the Public Service Commission of New York opposed the request for remand.

On June 16, 1970, the court below entered an order denying the petitions for rehearing.

The court below stated (App. B, pp. 1-3):

> . . . We wish to make crystal clear the authority of the Commission in this case to reopen any part of its order that circumstances require be reopened. Under section 19(b) of the Natural Gas Act, this Court has the broad remedial powers that inhere in a court of equity, and pursuant to our equitable powers we make it part of the remedy in this case that the authority of the Commission to reopen any part of its orders, including those affecting revenues from gas already delivered, is left intact. The Commission can make retrospective as well as prospective adjustments in this case if it finds that it is in the public interest to do so.
>
> At the same time, we emphasize that our judgment is an affirmance and not a remand. The appropriate place for originally considering what parts of the orders must be reopened in light of new evidence is before the Commission. It may be that the Commission will decide that the refunds it has

> ordered are just and reasonable or at least that their significance to the public interest is outweighed by the confusion and delay that would result from their reopening. In this event, the Commission will allow its refund orders to stand as they are. Or it may be that the refunds are too burdensome in light of new evidence to be in the public interest. In that case it is our judgment that the Commission shall have the power and the duty to remedy the situation by changing its orders.
>
> In all other respects, the original opinion of this Court is the final disposition of this appeal.[10]

Subsequently, the court below denied producer applications for stay of the mandate, but on July 2, 1970, acting on its own motion, and without notice, the Commission entered an order continuing the stay of Opinions No. 546 and 546-A and accompanying orders.[11]

On July 2, 1970, certain producers, based on the decision of June 16, 1970 of the court below, filed a motion for continuation of the stay and for reopening of the proceedings and consolidation thereof with the new, second round of Southern Louisiana area rate proceedings at Docket No. AR69-1 and for retroactive reconsideration of the rate levels and refund requirements of the orders affirmed by the court below. Pending also before the Commission are petitions by two producers for exemption from the refund requirements of the orders.

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[10] MDG in No. 669, the New York Public Service Commission in No. 692, and the Associated Gas Distributors in No. 691, have filed petitions for writs of certiorari directed to the ruling of the court below that the Commission may revise rates retroactively.

[11] MDG's application for rehearing of the Commission's July 2 order continuing the stay on the ground that the order is beyond the Commission's power, was denied by order issued September 30, 1970.

ARGUMENT

The decision of the court below in the respects challenged by Continental Oil Company and Mobil Oil Corporation (Petitioners),[12] does not conflict with any decision of this Court or with decisions of another circuit court of appeals. The court below properly exercised its functions as a reviewing court and properly affirmed the Commission's opinions and orders on the ground that they are supported by substantial evidence, followed legal standards, and are free from legal error. No issues raised by Petitioners warrant or necessitate review of this Court.

1. In the *Permian Basin Area Rate Cases*, 390 U.S. 747, this Court emphasized that reviewing court's "authority is essentially narrow and circumscribed." (390 U.S. at 766). For the Commission's findings, if supported by substantial evidence, are unqualifiedly conclusive upon the court (390 U.S. at 767); Congress "has entrusted regulation of the natural gas industry to the informed judgment of the Commission, and not to the preferences of reviewing courts." (390 U.S. at 767); the orders of the Commission are presumptively valid and those who would overturn them have "the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." (390 U.S. at 767); and each detail of the Commission's decision need not be examined if the total effect of the order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end (390 U.S. at 767).

In fulfilling its review function, this Court said, a reviewing court has essentially three responsibilities: first, to

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[12] The petitions filed in Nos. 681, 682, 683, 684 and 685 raise substantially the same issues raised by Petitioners in No. 680. Accordingly, while referring only to Petitioners' position in No. 680 in this brief in opposition, it is also intended to be, and is filed, as MDG's brief in opposition to the petitions in Nos. 681, 682, 683, 684 and 685.

determine whether the Commission's orders, viewed in light of the relevant facts and its broad regulatory duties, abused or exceeded its authority; second, to examine the manner in which the Commission employed the methods of regulation it has selected and to decide whether each of the orders' essential elements is supported by substantial evidence; and third, to determine whether the order may reasonably be expected to maintain financial integrity, attract necessary capital and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interests, both existing and foreseeable. (390 U.S. at 791-2).

The court below was fully aware of its authority and its responsibilities as a reviewing court as delineated by this Court (App. A, pp. 9, 10) and the court below correctly performed its function. On the question of the specification of the circumstances under which producers could secure relief from the rates prescribed by the Commission, the court below found that the Commission had responded to this Court's suggestion in *Permian* for a more precise specification of changed circumstances that would be ground for relief, and had given examples which "probably constitute as specific an exposition of circumstances for relief as can be expected at this stage in area regulation" (App. A, p. 15). With respect to consumer arguments that the Commission's cost determinations were excessive and that allocation methods adopted by the Commission assigned too much to natural gas and too little to oil, the court below found that the Commission acted on the basis of substantial evidence (App. A, pp. 18-21 and notes 29 to 34, inclusive). With respect to rate of return, the court below reviewed consumer arguments that the 12 percent rate of return was too high and producer arguments that it was too low and rejected the arguments of each on the ground that the Commission's findings on rate of return were supported by substantial evidence and "followed proper legal standards," noting that the "noncost factors" increased the allowed 12 percent rate of return to 14 to 16 percent

(App. A, pp. 23, 24, 40, and note on p. 40). Concerning producer attacks on Commission cost determinations: the court below found that the producers' attacks on the use of cost and on the cost determinations were also made in *Permian* and were there rejected by this Court (App. A, pp. 40-42), and that the Commission's cost findings here were supported by substantial evidence (App. A, 41-42). Respecting the producers' arguments that the record was stale and unrepresentative, despite the fact that there was no issue as to test year before the Commission, the court below rejected the arguments, correctly relying on *ICC v. Jersey City*, 322 U.S. 503, 514-5, and correctly finding that the Commission considered "some data covering years as recent as 1966" and in making choices between older and more recent data on the ground of greater reliability or representativeness "did not fail to consider the most recent data in the record, and it adjusted its findings to allow for rising or falling cost trends" (App. A, p. 44). "Most importantly", the court below found, "it made a finding that costs as a whole during this decade had been remarkably stable (or were even declining slightly) and were likely to remain so, and this finding is based upon substantial evidence." (App. A, p. 44).

In view of the court's findings that the Commission's rulings followed legal standards and were based on substantial evidence, the court below stayed within its proper sphere when it entered its judgment of affirmance. Indeed, contrary to Petitioners' contention (Pet., p. 17) this was the only logical, lawful and required action; not reversal and remand. The court below understood and properly fulfilled its judicial role as a reviewing court.

It is, of course, true that the court below was not entirely satisfied with the extent of some of the Commission's findings and explanations, as they affected consumer and producer arguments, but the court below did not find that the deficiencies amounted to reversible error. Having found that proper legal standards were employed and that substantial

evidence supported the findings on every important aspect of the case that bears on recovery of costs, including an extremely generous 14 to 16 percent rate of return, the court below correctly refused to regard the Commission's opinions and orders when viewed in their entirety as reversible.

Federal Power Commission v. United Gas Pipe Line Company, 393 U.S. 71 (1968) and *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 353 U.S. 944 (1957), cited by Petitioners (Pet. 17), are not in point. In the *United* case, *supra*, the Fifth Circuit undertook to decide how a tax allocation formula should be applied although the Commission had never considered the question. This Court summarily reversed the Fifth Circuit on the ground that it should have remanded the question for consideration by the Commission in the first instance (393 U.S. at 73). Nothing of that nature is involved in this case. In *Sunray Mid-Continent*, the Tenth Circuit reversed the Commission (239 F.2d 97) because it had erred in its interpretation of its authority under Section 7 of the Natural Gas Act. This Court held that the power of the reviewing court was exhausted when it so ruled and that it should have remanded the case to the Commission for consideration on the merits (353 U.S. at 945). This fact situation is not present in this case. Here, the relevant questions presented by the record evidence had been considered and the court ruled that all rulings on such questions were lawful and were supported by substantial evidence.

2. Petitioners' continued insistence that the methods of rate regulation employed by the Commission for producers are inapplicable to producers and that the Commission's cost determinations in this case are faulty (Pet. 15, 23, 24-25) are without merit and provide no basis for a grant of their petition. The same arguments respecting methodology, particularly reliance on cost, were rejected by this Court in *Permian* where they were specifically found to have a "reasoned foundation" and to be within the area of the Com-

mission's expert judgment (390 U.S. at 824), and were rejected by the court below for the same reasons (App. A, pp. 40-42). As for the cost determinations in this case, they were found to be supported by substantial evidence and in accord with legal standards. Petitioners show nothing in their petition requiring a contrary conclusion. Petitioners rely on bold assertion, without record support and citation.

3. The Alpha and Omega of the Petitioners' argument for a writ of certiorari is the claim that there is a present shortage of natural gas which "is directly involved in this case because rates prescribed apply to an area that now provides up to one-third of the total national supply and serves more than one-half the consuming population of the United States." (Pet. 15, 24, 25).[13]

Petitioners state that "the only valid question remaining is, in essence, how to remedy" the supply "situation" (Pet. p. 16), and suggest that reversal is the only remedy (Pet. p. 16). Inherent in the argument is the unwarranted assumption that "the Commission's ill-founded and unsound regulatory concepts have hastened, if not caused, the present critical gas supply shortages." (Pet. p. 24).

Any number of reasons may account for the "shortage", however, which have no relationship to the present order

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[13] Assuming, *arguendo*, that there is a shortage of natural gas, it is important that the Court not be misled. The "shortage" does not affect existing commitments to consumers. There is no "shortage" to meet such existing commitments. The "shortage" refers to new increments of gas to meet an unexpected and explosive recent demand for natural gas, primarily industrial, as a result of air pollution and other environmental considerations. The demand for natural gas has been aggravated by the shortage of other fuels such as low sulphur oil and coal that are suitable for such purposes. The "shortage" assumes all demands should be served by natural gas disregarding the question of the economically wasteful use of natural gas and efficient allocation of the Nation's energy resources, including natural gas, in the Nation's best interests.

in particular and the Commission's regulatory policies in general.[14]

The "shortage" may be the consequence of the acknowledged explosive increase in demand for gas that the industry did not anticipate or prepare for. The "shortage", such as it is, may be the consequence of tax policies that may have reduced internally generated funds available for exploration and development rather than any Commission pricing of natural gas. Depressed sales of oil, upon which the industry principally relies for internally generated funds for exploration and development, may have reduced exploratory effort. Enormous commitments made by the oil companies in foreign areas and Alaska may have drained off funds that would normally have been available for exploration and development of continental, including continental shelf, gas resources. Failure of the Federal government to offer oil and gas leases in areas in the federal domain may have affected reserve additions. The "shortage" may be a result of a combination of some or all of these forces or of others not mentioned. Or the "shortage" may be contrived to force higher prices for natural gas. Testifying before the Senate Judiciary, Sub-Committee on Antitrust and Monopoly, Honorable George P. Shultz on March 3, 1970, said:

> The [petroleum] industry is capable of behaving irrationally for short periods, and even of contriving an apparent disaster by ceasing exploration [and] dramatically revising its reserve additions downward . . . [Such industry action could] produce an appearance of crisis calling for immediate 'corrective' action, e.g., . . . higher prices. . . . The industry associations could help to produce such an impression . . . And we must not forget that the

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[14] A lag between exploratory efforts and production of at least several years rules out any relationship between the Commission's orders in this case and the "shortage" which is alleged to have developed on the heels of the Commission's orders.

'facts' for decision will be produced largely by these same firms and associations.

> The industry is not monopolistic enough to sustain a false reaction over an extended period; in the long run the normal commercial motives will reassert themselves and objective facts would win out. But we have no assured means of preventing overreaction or downright manipulation in the short run, nor is it clear how the administration would distinguish between a fake disaster and a real one.

Whatever the cause or causes of the "shortage" may be, it is a circumstance that is not relevant to review of the orders in this case. The court below noted (App. A, p. 52) that "circumstances" had developed subsequent to the close of the record and issuance of the Commission's decisions that "indicate a possibility, indeed perhaps a certainty, that the supply of gas is dangerously low." The "circumstances" included speeches made by members of the Commission (App. A, p. 53), clearly extra-record and non-evidentiary, and an FPC Staff *Report on National Gas Supply and Demand*, (App. A, p. 54) issued six months after the Commission's order on rehearing. With respect to this latter document, which is also extra-record and non-evidentiary, the lower court stated (App. A, p. 58):

> . . . We do not know whether the information that has reached us is correct or not. Staff states that 'For purposes of this report we have accepted at face value all industry furnished data. Our conclusions must therefore be weighed against the assumed accuracy of our data base.' It also states that it is setting forth only one of several possible forecasts, albeit it is the one it thinks most probable.

The whole question of "shortage" was then placed in proper perspective by the court (App. A, p. 58):

> . . . our best course is to keep within the proper sphere of a reviewing court. The point is that the probability of shortage *based on new evidence* is not before us for review; all that is before us is the legal

adequacy, and not the wisdom, of the Commission's orders. (italics supplied)

The true nature and cause or causes of the "shortage" are not known and are yet to be established. The Commission has instituted a new proceeding at Docket No. AR69-1 to do just that and to determine whether rate revisions are in order. Docket No. AR69-1 is the place for the remedy *if* the "shortage" is price-related. *ICC v. Jersey City*, 322 U.S. 503, 515; *National Labor Relations Board v. Condenser Corp.*, 128 F.2d 67, 81 (CA 3).[15] The claim of a gas shortage is simply not relevant to the disposition of the Commission's rate orders.

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[15] ". . . If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening . . ." (322 U.S. at 515). "The legal situation has to be viewed as of the time of the Board's Decision; otherwise, there is the danger, often spoken of, of making a merry-go-around of the Act." (128 F.2d at 81).

CONCLUSION

The petitions for writs of certiorari in Nos. 680, 681, 682, 683, 684, and 685 should be denied.

Respectfully submitted.

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OCTOBER TERM, 1970

SOUTHERN LOUISIANA AREA RATE CASES

MUNICIPAL DISTRIBUTOR GROUP, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 669, 680–685, 691, 692

SOUTHERN LOUISIANA AREA RATE CASES

MUNICIPAL DISTRIBUTOR GROUP, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The initial opinion of the court of appeals (Cont. App. A, pp. 1–70)[1] is reported at 428 F. 2d 407. Its opinion on petitions for rehearing (Cont. App. B, pp. 1–3) is not yet reported. The opinions (No. 546) of the Federal Power Commission (Cont. App. D, pp. 1–258) are reported at 40 F.P.C. 530. The Commission's opinion (No. 546–A) on rehearing (Cont. App. E, pp. 1–112) is reported at 41 F.P.C. 301. (Opinions 546 and 546–A are hereinafter referred to as "*Southern Louisi-*

[1] "Cont." references are to the separate appendix to the petition filed by Continental Oil Company, in No. 680.

and I"). The decision of the Hearing Examiner (III J.A. 62d–447d) is reported at 40 F.P.C. 703.

JURISDICTION

The judgment of the court of appeals (Cont. App. C) was entered on March 19, 1970, and was clarified by opinion and order on timely petitions for rehearing on June 16, 1970 (Cont. App. B, pp. 1–3). The present petitions were filed on September 9 and 14, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether a reviewing court acting pursuant to Section 19(b) of the Natural Gas Act may affirm a Commission rate order with the condition that the Commission may modify that order if it determines, on the basis of new evidence appearing since the close of the initial Commission proceedings, that the public interest requires a modification.

STATEMENT

These petitions involve the Commission's second decision regulating producer rates on an area basis. The area here is Southern Louisiana, which is defined as that portion of the state lying south of the 31st parallel, including state and federal areas in the Gulf of Mexico off the Louisiana coast (Cont. App. D, p. 6), and which covers about 54,000 square miles with similar geological characteristics, almost equally divided between land and offshore waters (Cont. App.

D, p. 10): *Southern Louisiana I* was initiated in May, 1961 (25 F.P.C. 942). The Commission issued Opinion No. 546 on September 25, 1968, and Opinion No. 546–A on rehearing on March 20, 1969.

A. Background

The Commission assumed jurisdiction over the well-head sales of natural gas sixteen years ago pursuant to this Court's opinion in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672. For approximately six years, the Commission struggled to apply the theory of public utility regulation to an industry whose risks, investments, and operations could not be compared to a pipeline, an electric utility, or any other utility with facilities dedicated to the public use. The Commission's initial effort to regulate the price for each of the nearly 2,425 producers selling in interstate commerce in 1960 on a company-by-company cost basis brought the regulatory process to a standstill. Therefore, in 1960 the Commission announced proceedings to regulate producers on an area basis. Under this methodology, an individual producer's actual costs would be immaterial in determining his rates. Instead, a ceiling price per unit of gas would be allowed uniformly to all producers in an area. While the area rate proceedings were being developed, litigation and Commission policy statements established interim ceiling prices under which permanent certificates would be granted pending the outcome of the area rate cases;

these rates were called "in-line" and "guideline" rates.[2]

For five years the Commission struggled with its first area rate proceeding, finally issuing an opinion and order in 1965 establishing area rates for the Permian Basin. *Permian Basin Area Proceeding*, 34 F.P.C. 159, 1068, 1286. The Commission's regulatory procedures there were affirmed by this Court as being constitutionally permissible and not an abuse of the Commission's powers under the Natural Gas Act. *Permian Basin Area Rate Cases*, 390 U.S. 747. Emphasizing that "area regulation of producer prices is avowedly still experimental in its terms and uncertain in its ultimate consequences" (390 U.S. at 772), this Court recognized that the *Permian* case was "the first of many steps toward a more expeditious and effective system of regulation" (390 U.S. at 772, n. 37) and called upon the Commission to "continue to examine both the premises of its regulatory methods and the consequences for the industry's future of its rate-making orders" (390 U.S. at 816, n. 99).

Only five months after this Court's *Permian* decision, the Commission handed down its initial decision in *Southern Louisiana I*—the second area rate case—which had been pending before the Commission since 1961.

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[2] See *e.g.*, *Federal Power Commission* v. *Sunray DX Oil Co.*, 391 U.S. 9; *United Gas Improvement Co.* v. *Callery Properties*, 382 U.S. 223.

B. *Southern Louisiana I and Subsequent Commission Proceedings*

In *Southern Louisiana I,* the Commission adhered to the multiple-price system adopted in *Permian* in establishing rates for the sale of natural gas to interstate pipelines (Cont. App. D, pp. 20–22). Natural gas which is not produced in association with oil production and which is being produced under contracts dated prior to January 1, 1961 was denominated "flowing gas-well gas" (Cont. App. D, p. 28). Non-associated gas produced under contracts dated subsequent to January 1, 1961 was termed "new gas-well gas" (Cont. App. D, p. 28). Generally, higher ceiling prices were permitted for the sale of new gas-well gas (Cont. App. D, p. 9). Gas produced in association with production of oil, or "casinghead gas," was given the same ceiling prices as flowing gas-well gas without regard to contract date (Cont. App. D, p. 9). The ceiling rates permitted for the sale of each were based primarily on costs (Cont. App. D, pp. 21–22).

The costs for flowing gas-well gas were developed in Southern Louisiana on an historical basis and primarily reflect expenditures for exploration and development in 1960, operating expenses in 1960, and investments which were made by producers through 1960 (Cont. App. D, pp. 85, 91, 248–49). Allocations were made by the Commission with respect to many costs and capital investments which producers incurred in the joint effort to discover and produce either oil or gas (Cont. App. D, pp. 88–93; 96–103).

A return at the rate of 12 percent was allowed on the industry-wide net book investment as of year-end 1960 (Cont. App. D, p. 104). Except for exploration and development expenditures, flowing gas costs were determined on an area basis per thousand cubic feet (Mcf) of gas produced (Cont. App. D, pp. 85, 249–50).

The cost of new gas-well gas was determined on a nationwide basis per Mcf of reserves added (Cont. App. D, p. 33). Unit costs were determined by taking the average annual expenditures for each component of cost and relating those expenditures to the average annual volume of non-associated gas reserves added or, in the case of operating expense, to the annual production volume (See Cont. App. D, pp. 31, 33). Unsuccessful exploration and development expenses, such as dry holes, were allocated between oil and gas; other allocations were also required between oil and gas (See Cont. App. D, pp. 36–37, 88–89). The applicable rate of return was applied to a rate base representing industry-wide investments spread over a 20-year recovery period and also taking into account an average lag of a year between the investment of funds in the search for gas reserves and the commencement of revenue from the sale of reserves discovered as a result of that search (Cont. App. D, p. 50). Natural gas liquids are usually found in conjunction with non-associated gas. Total finding and production costs for non-associated gas were reduced by the net market value per Mcf of such liquids (Cont. App. D, pp. 42–45). Although the Commission at the time of its 1968 decision recognized the

availability of later cost data, it did not actually employ such later data in the new gas cost calculations (Cont. App. D, pp. 36–40; 47–48). Instead, the costs were based primarily on data applicable to the period prior to 1961, although data as recent as 1966 were considered by the Commission (Cont. App. D, p. 39).

Having determined the costs involved, the Commission established three "vintages" of gas with separate ceiling prices for each (Cont. App. D, pp. 174–175). The first vintage included flowing gas-well gas and all casinghead gas; as to this the Commission fixed a maximum price of 17 cents per Mcf (Cont. App. D, pp. 175, 179).[3] New gas-well gas sold under contracts dated between January 1, 1961 and October 1, 1968 (second vintage) was given a ceiling price of 18 cents per Mcf (*Id.*). The third vintage was for new gas-well gas produced under contracts dated on or after October 1, 1968, on which an extra .5 cents would be allowed "to encourage continuation of necessary exploration and development activities and to recognize the greater uncertainties and possibilities of fluctuation [with respect to unit costs] to which the sellers are exposed" (Cont. App. D, p. 175). Accordingly, the ceiling price for third vintage gas was set at 18.5 cents (Cont. App. D, pp. 175–179).

An indefinite moratorium was also established prohibiting producers from filing for rate increases above the rates set "until such time as they may be changed by the Commission" (Cont. App. D, pp. 169–73).

[3] As to each vintage, 1.5 cents per Mcf would be added to the ceiling price of gas subject to the Louisiana production tax.

Any amounts collected above the applicable area rates established in *Southern Louisiana I* after its effective date of October 1, 1968 were to be subject to refund. In addition, with respect to rates which had been collected prior to that date subject to refund under Section 4(e) of the Natural Gas Act, the applicable area rates were to be effective from the date such Section 4(e) rates were collected, with the difference to be refunded. No refunds were required, however, to the extent that the applicable area rates were below rates allowed by a final, unconditioned permanent certificate or a settlement. The amounts of the refunds and their disposition were made subject to further Commission order. (Cont. App. D, pp. 183–88; Cont. App. E, pp. 43–46.)

On March 20, 1969, some six months after its initial decision, the Commission modified its opinion by the issuance on rehearing of Opinion No. 546–A. The moratorium for the third vintage taxed gas was given a termination date of January 1, 1974 (Cont. App. E, pp. 7–8). Moreover, because of the Commission's concurrent decision to institute a new proceeding applicable to the offshore federal domain area, Docket No. AR69–1 (hereinafter "*Southern Louisiana II*"), the Commission determined to permit rate increase filings, subject to suspension and refund, up to 20 cents per Mcf for third vintage gas-well gas in the offshore federal domain (Cal. App. B, pp. 1–8).[4]

[4] "Cal." references are to the separate appendix to the petition filed by The California Company in No. 682.

During the pendency of the instant case before the Fifth Circuit, the Commission on December 15, 1969 expanded *Southern Louisiana II* to include all vintages of gas in Southern Louisiana, both on and offshore, and called upon the parties to provide evidence on "the adequacy of gas supply and adequacy of service to consumers, the demand for gas, the cause of a gas shortage, if any, the effect of price on gas supply and demand, and other relevant economic evidence, together with the current, nationwide cost of finding and producing non-associated gas" (Cal. App. B, pp. 9–15).

On July 17, 1970, the Commission initiated Docket No. R–389A in order to determine, nationwide, "the terms and conditions which will result in an adequate supply of natural gas for consumers at the lowest rate consistent with maintaining an industry structure capable of providing, and motivated to provide, service with its attendant risks." That proceeding encompasses Southern Louisiana but only as to gas produced under contracts dated subsequent to June 17, 1970. 35 Fed. Reg. 11638.

On July 30, 1970, the Commission initiated Docket No. R–394 in order to determine whether to lift the moratorium prohibiting rate increases in Southern Louisiana that had been imposed by *Southern Louisiana I* (Cal. App. B, pp. 39–43). That proceeding remains pending.

The rates set by the Commission in *Southern Louisiana I* have never been ordered into effect.

C. The Court of Appeals Decisions

Petitions to review the Commission's orders in *Southern Louisiana I* were filed in various courts of appeals by producers, pipeline companies, distributors and one state commission and were consolidated in the United States Court of Appeals for the Fifth Circuit. On March 19, 1970, the Fifth Circuit entered its first opinion. After recognizing that the purposes of the Natural Gas Act encompassed maintenance of adequate service for the consumer, the court pointed out that the Commission had declined to estimate either the overall demand for gas or the future supply which its order would elicit, and expressed concern that this was a violation of this Court's directive in *Permian* (Cont. App. A, pp. 46–50). The court nonetheless affirmed the Commission, noting that the Commission had initiated a new proceeding—*Southern Louisiana II*—to consider the possible inadequacy of its orders and was now aware of new information on the supply situation; the court stated that an evaluation of the supply situation and determination of the action needed were for the Commission and not a reviewing court, and that the Commission's orders were procedurally and substantively adequate in light of this Court's decision in *Permian* and the fact that the "experiment" doctrine of *Permian*—giving the Commission substantial leeway to develop procedures for establishing area rates—was still in effect (Cont. App. A, pp. 56–59). Accordingly, the orders of the Commission were "sustained in full" (Cont. App. A, p. 69).

The court did, however, specifically identify improvements it felt the Commission should make in its handling of area rate proceedings. The Commission was called upon, for example, to identify and explain the rate components, to assess the character and number of individual producers that will remain after a rate order has had its effect, to assess the capital actually available to the industry as a whole and to assess the industry's probable conduct and performance as a result of an order. The court further called upon the Commission to make findings as to the market variables of supply and demand, and to set out the supply levels which its orders should elicit (Cont. App. A, pp. 61–68).

In view of these suggested improvements and in view of the Commission's knowledge of the impending natural gas supply crisis, the court acknowledged that the Commission might wish immediately to modify its *Southern Louisiana I* order despite the affirmance (Cont. App. A, p. 59) and cautioned that the affirmance should not be construed to interfere with such modification (Cont. App. A, p. 69).

Certain parties petitioned for rehearing, urging the court to remand the case for the taking of further evidence and to require further findings on the supply issue; they argued that the affirmance would preclude the Commission from modifying the rates for gas already delivered if necessary to deal with the supply problem. To assist in its consideration of those petitions, the court directed two specific questions to the Commission concerning (1) the Commission's au-

thority to stay, modify or rescind an order once that order had been "affirmed" and (2) a reviewing court's equitable powers to "affirm" while preserving Commission authority to "stay, modify or rescind" an order.

In response (Cal. App. B, pp. 51–54) the Commission stated: (1) that it would not have the authority to permit retroactive rate changes after affirmance, unless authorized to do so by the court at the time of the affirmance; and (2) that a reviewing court under Section 19(b) of the Natural Gas Act had

> * * * full statutory power to authorize or to instruct the Commission to (a) reconsider the record before it under standards set by the Court or (b) reopen the record for a specific purpose or purposes and to submit any modifications of the rate order to the same Court for further review in the light of the Court's standards, or both, without necessarily reversing the Commission and vacating the order for a new hearing.
>
> Any equitable powers which would transcend these statutory powers would be determined by this Honorable Court. (Cal. App. B, p. 53).

The Commission's response further requested the court of appeals to clarify whether it "intended to authorize this Commission to make retrospective adjustments, if it deemed appropriate, in the rates set in [*Southern Louisiana I*] *as of the effective date of the Commission* opinions (October, 1968) to the present or whether the court intended, by the use of the words 'sustained in full' * * * to restrict the

Commission to prospective changes from some future date when subsequent Commission orders, if any, are issued lifting the moratoria or establishing a new just and reasonable rate" (Cal. App. B, pp. 53–54). In addition, the Commission requested a remand of the case so that "the Commission can discharge its regulatory responsibilities consistent with the Court's opinion" (Cal. App. B, p. 54). Two of the five members of the Commission did not concur in the request for a remand, one of them stating that a remand "would create a climate which will inhibit a possible settlement in the pending [*Southern Louisiana II*] proceeding which was an outgrowth of the Commission's awareness that the gas supply situation was changing" (Cal. App. B, p. 55).

On June 16, 1970, the Fifth Circuit issued a *per curiam* order expressing its intention, pursuant to its equitable powers, to authorize the Commission to reopen all aspects of its order, including those affecting revenues from gas already delivered. Although emphasizing that its judgment was an affirmance and not a remand, the court left for the Commission's consideration what parts of the orders, if any, should be reopened in light of new evidence and stated that the Commission should have the power and the duty to review and revise its refund orders if this was in the public interest. (Cont. App. B, pp. 1–3).

Following the opinions of the court of appeals, the Commission further stayed any rate reduction pursuant to *Southern Louisiana I* until further order of the Commission (Cal. App. B, p. 31).

ARGUMENT

A.

The issues presented in the various petitions arise in the context of a potential crisis in the adequacy of supplies of natural gas for millions of consumers. Before turning to the specific issues raised by petitioners, it is necessary to understand the seriousness of the crisis and its interrelation with the area rates established by the Commission in *Southern Louisiana I*.

The Commission's staff projects on the basis of current trends, and subject to rebuttal, that by 1973 sufficient gas will not be produced to meet this country's demands unless new reserves are found at an accelerated pace. Although gas produced in Southern Louisiana accounts for approximately one-third of the total volume of gas currently being supplied across the nation,[5] directly affecting consumers in 28 central and eastern states (Cont. App. D, p. 12), Southern Louisiana has accounted for about 63 percent of the nation's total net increase in production since 1964. Production from that area, however, cannot continue to be increased at historical rates under present levels of reserve additions. Thus to a significant extent, it appears that the capacity to meet projected national demands for natural gas is dependent upon increased efforts to discover new reserves in Southern Louisiana (*Southern Louisiana II*, transcript pp. 1092–1121; 3938–4169). Accordingly, the Commission must estab-

[5] According to data filed with the Commission by interstate pipelines, the area accounted for 40 percent of the gas sold in the interstate market in 1969.

lish rate levels which provide the necessary capital and incentive to expand the exploration and development of additional reserves in this area.

Evidence concerning the present and future gas supply situation, which was ordered by the Commission on December 15, 1969 (*supra,* pp. 8–9), has been received by the Examiner in *Southern Louisiana II,* has been subjected to rebuttal and cross-examination and will be placed before the Commission within the near future. Since this evidence was not available except through allegation when the Commission decided *Southern Louisiana I,* the rates established by the Commission in that case, which have not yet become effective, necessarily were not based upon a consideration of such evidence. The refunding of approximately $375,000,000 by producers without adequate regard for (1) the effect the rates would have on the adequacy of supply to meet consumer needs, (2) the effect the refunds would have on the ability of producers to provide the capital for exploration and development programs, and (3) the effect on the number of competitors in the search for natural gas, would not be in the public interest. It must be determined whether all or part of the capital represented by the refund dollars is required for exploration and development before any refund levels are finally determined and ordered. If the Commission were limited to prospective changes of rates in Southern Louisiana, there would be no assurance that immediate capital needs, to the extent they are found to exist, could be fulfilled, since rates for future sales can generate capital only gradually over a period of years.

B.

While it is thus of great practical importance to the public that the Commission be authorized to conduct further proceedings in *Southern Louisiana I*, the legal issue raised by the distributor petitions (Nos. 669 and 691) and the petition of the New York Public Service Commission (No. 692) as to whether the court of appeals acted within its power in authorizing the Commission to conduct such further proceedings is not difficult to resolve. As an analysis of the unanimous decision below and Section 19(b) of the Natural Gas Act demonstrates, the court clearly acted within its powers and there is accordingly no occasion for plenary review of the issue by this Court. The remaining issues presented by the above and other petitions are not substantial and are premature.

1. It is misleading to contend, as do the distributors and the New York Public Service Commission, that the Commission has been granted the power to change rates retroactively. The Commission, of course, has no power to change finally approved rates retroactively and claims none. But where a reviewing court acting pursuant to Section 19(b) of the Natural Gas Act authorizes the Commission to conduct further proceedings with respect to certain rates, those rates are not final and may be revised by the Commission.

The court of appeals, in its initial opinion of March 19, 1970, criticized the Commission for failing, in setting rates for Southern Louisiana, to give adequate consideration to the future natural gas needs of the public. Recognizing that the Commission was undertaking a comprehensive review of the adequacy

of future gas supplies in *Southern Louisiana II*, during which review the Commission might discover that the rates set in *Southern Louisiana I* were inadequate, the court affirmed. The affirmance was qualified, however, and the court cautioned that the opinion should not be interpreted "to interfere with Commission action that would change the rates we have approved here" (Cont. App. A, p. 69). Whatever lack of clarity this qualified affirmance might have had was cured by the court's June 16 opinion on rehearing. The court there expressly relied on its equitable powers and its broad remedial powers under Section 19(b) to authorize the Commission to reopen any part of its orders in *Southern Louisiana I* (Cont. App. B, p. 2), subject, of course, to further judicial review.

In our view, the court acted within the scope of the authority granted to it under Section 19(b) of the Natural Gas Act. That section permits a reviewing court "to affirm, modify or set aside [an] order in whole or in part" and to "order * * * additional evidence to be taken before the Commission." That this provision contains a broad grant of equitable powers has been recognized. *Natural Gas Pipeline Company* v. *Federal Power Commission*, 128 F. 2d 481 (C.A. 7); see also *Ford Motor Co.* v. *National Labor Relations Board*, 305 U.S. 364, 374; *Dolcin Corp.* v. *Federal Trade Commission*, 219 F. 2d 742 (C.A.D.C.), certiorari denied, 348 U.S. 981.

2. The remaining issues raised by the petitions are concerned with specific elements of the methodology adopted by the Commission for the determination of just and reasonable rates for Southern Louisiana. While the court of appeals was critical of certain aspects of the Commission's methodology, it recognized that the regulatory "experiment" referred to by this Court in *Permian* was still in progress and that the Commission should be given latitude to develop and improve criteria for determining rates (Cont. App. A, p. 56–59). The court of appeals was clearly correct in upholding the Commission on these issues and no matters warranting review by this Court are thus presented.

Finally, consideration of these issues by the Court at this time would be premature and would delay the holding of further proceedings before the Commission.[6] Upon completion of those proceedings, any remaining regulatory issues could be presented to the courts.

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[6] Uncertainty caused by the petitions for writs of certiorari may well inhibit the Commission from expediting its regulatory process in this and related cases to establish stability in rate levels in Southern Louisiana. Only after stable rates are established, at levels which take into account the potential demand for natural gas and the need to discover sources of supply to meet the demand, will the public be protected against the possibility of a critical natural gas shortage. Under present circumstances, there is no assurance that sufficient capital will be available for immediate exploration needs. The Department of the Interior, for example, has given notice that offshore federal lands off Western Louisiana may be made available for lease in the immediate future. 35 Fed. Reg. 8699. Large commitments cannot be expected in the face of uncertain rate levels and uncertain cash refund requirements. Data available to the Commission indicate that these leaseholds are likely to contain large reserves of natural gas.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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v.

FEDERAL POWER COMMISSION, ET AL.

REPLY OF MUNICIPAL DISTRIBUTOR GROUP, PETITIONER IN NO. 669, TO SUPPLEMENTAL STATEMENTS

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REPLY OF MUNICIPAL DISTRIBUTOR GROUP, PETITIONER IN NO. 669, TO SUPPLEMENTAL STATEMENTS

The so-called "Settlement Proposal" filed with the Federal Power Commission on November 6, 1970, by the United Distribution Companies,[1] which admittedly[2]

[1] A number of the distributors comprising the United Distribution Companies are members of natural gas pipeline systems having a stake in higher prices for natural gas production by reason of their important ownership of, and pecuniary interest in, natural gas production properties.

[2] See Supplemental Statement in No. 691 at page 2 and the Commission's Supplemental Memorandum at page 2.

is not supported by all parties to the Southern Louisiana Area Rate Proceedings and has not yet been considered by the Commission, emphasizes, rather than diminishes, the importance of the petition for a writ of certiorari of the Municipal Distributor Group and the necessity for an immediate decision by this Court of the questions presented by that petition, if the primary aim of the Natural Gas Act—protection of gas consumers from exploitation at the hands of natural gas producers and natural gas pipeline companies—is to be realized. *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610.

The "Settlement Proposal," would, if approved by the Commission, retroactively revise the just and reasonable rates prescribed by the Commission in Opinions and Orders No. 546 and 546A, which were affirmed by the court below, and would deprive consumers of the refund of $375 million of charges found by the Commission to be excessive. Supporting the United Distribution Companies' motion for promulgation of the settlement proposal, the Staff of the Commission has just represented to the Commission:

> . . . The resolution of all issues in the Southern Louisiana area necessarily required consideration of Docket Nos. AR 61-2, *et al.* Although the Commission has already issued orders in those proceedings, *the Court of Appeals for the Fifth Circuit has given the Commission authority to reopen any part of its orders that circumstances require be reopened.* (Italics supplied)

And the Commission itself in its Supplemental Memorandum filed in this Court admits (p. 3) that "some of the issues raised here also underly the proposed

settlement", thus putting to rest once and for all the suggestion of prematurity contained in briefs in opposition to the petition for a writ of certiorari of the Municipal Distributor Group.

Moreover, contrary to the contentions of petition in No. 691 (Supp. Statement, p. 2) and of the Commission (Supp. Memo., p. 3), the grant of the Municipal Distributor Group's petition will not impede resolution of producer rate issues. Rather, instability and uncertainty will remain for years if the questions presented by the petition of the Municipal Distributor Group are not decided at this time. For upon approval of the "Settlement Proposal" by the Commission, questions respecting the validity of the retroactive revision of the rates, and denial of refunds to consumers, inherent in the "Settlement Proposal," will be submitted to a United States court of appeals for an appropriate Circuit for review and, thereafter, either on petitions of producers or consumers, will be back before this Court after a delay of a year or more, during which time instability and uncertainty will prevail.

If the petition of the Municipal Distributor Group were premature before, which it was not, it is not premature now, and uncertainty and delay can only be avoided by decision on the questions presented by the petition at this time.

WHEREFORE, for each and all reasons previously stated, the petition of Municipal Distributors Group for a writ of certiorari and its prayer for summary

reversal of the court below on the questions presented in the petition should be granted.

Respectfully submitted,

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FEDERAL POWER COMMISSION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL POWER COMMISSION

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SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL POWER COMMISSION

We file this supplemental memorandum to point out the following events ~~which have~~ occurred since the filing of the Commission's Brief in Opposition to the petitions for writs of certiorari in these cases:

1. On November 6, 1970, the United Distribution Companies [1] filed a proposed resolution on the merits

[1] The United Distribution Companies group consists of 32 distribution utilities serving more than ten million customers in twelve midwestern and eastern states. This group represents over 25 percent of the gas distribution operations in the United States.

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of *Southern Louisiana I* and *II* with the Commission. The proposed resolution was developed at settlement conferences ordered by the presiding examiner in *Southern Louisiana II* (Tr. 1081) and open to all parties to the proceedings. The Commission has given notice of the proposal to all parties to *Southern Louisiana I* and *II* and has directed that any response to the proposal be filed with the Commission by December 11, 1970. The Commission has not yet considered the settlement proposal on the merits and cannot do so until all parties have had an opportunity to be heard.

To date, a substantial number of the parties in the instant cases, as well as the Commission's staff in its role as representative of the public interest, have filed answers in support of the proposed settlement. These supporters include most members of the Associated Gas Distributors,[2] all interstate pipelines purchasing interstate gas in the Southern Louisiana area and producers accounting for more than 70 percent of the interstate sales from that area. Only the New York Public Service Commission, the Municipal Distributor Group,[3] a few members of the Associated Gas Distributors and several producers have not indicated a willingness to support the proposal. They will, following any filing of objections with the Commission, have

[2] The Associated Gas Distributors group consists of gas distribution utilities along the eastern seaboard and its members supply over 11 percent of the gas distributed in the United States.

[3] The Municipal Distributor Group represents a group of distribution utilities supplying less than 2 percent of the gas distributed in the United States.

an opportunity to present evidence in opposition to the proposed resolution on the merits.

2. The Department of the Interior has announced, as anticipated (Commission's Brief in Opposition, p. 18, n. 6), that an oil and gas lease sale for Offshore Louisiana will take place on December 15, 1970 (35 Fed. Reg. 16417).

In view of these developments and the fact that several of the petitions filed in these cases have now been conditionally withdrawn,[4] we respectfully submit that the remaining petitions for writs of certiorari should be expeditiously denied; since some of the issues raised here also underlie the proposed settlement,[5] any deferral of this Court's consideration would impede the further proceedings before the Commission.

ERWIN N. GRISWOLD,
Solicitor General.

GORDON GOOCH,
General Counsel,
Federal Power Commission.

NOVEMBER 1970.

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[4] We are informed that, as of the date of this filing, only the Municipal Distributor Group (No. 669), the Continental Oil Company and the Mobil Oil Company (petitioners in No. 680), Bradco Properties, Inc. et al. (petitioners in No. 683), the City of Norwich (one of the petitioners in No. 691) and the New York Public Service Commission (No. 692) still desire that their respective petitions for writs of certiorari be granted.

[5] In this regard, it should be noted that the question referred to in the Reply of the New York Public Service Commission in No. 692, pp. 2–7, of where the responsibility lies for the natural gas shortage which the Commission's staff has found to exist is at issue in *Southern Louisiana II*. All parties have had an opportunity to present evidence on that issue during the proceedings before the Commission in that case.

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